

Mogha's Law of Pleadings

with Precedents

TWELFTH EDITION

EASTERN LAW HOUSE

THE LAW OF PLEADINGS IN INDIA

[WITH PRECEDENTS]

BY

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With an Introduction

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INTRODUCTION

HIGH COURT

Allahabad, January 20, 1926

DEAR MR. MOGHA,

I promised that I would write an introduction to your book. I am sending it to you in the form of a letter because in it I can tell you more directly and intimately how heartily I congratulate you on the happy thought which caused you to commence this work and the industry which enabled you to carry it through. A lawyer coming to this country finds at least a sufficiency of books on general law and on its special branches, but until recently at least no work on pleadings of an authority was in existence. I am specially glad to notice the ability and knowledge you have brought to bear on this most important subject. In my opinion a knowledge of the science of pleading is the essential equipment of any man who desires to make headway in his profession and ignorance of it is a daily impediment. I could give no better advice to any one than to study again and again the precedents, principles and authorities which are to be found in your book. I confess that when I came here in 1919 nothing shocked me more than the abusive, irrelevant, reckless statements in pleadings and the failure of Subordinate Judges to exercise any control over them, by striking out irrelevant passages and demanding particulars so as to keep the evidence at the trial within proper limits and to prevent surprise. The position is getting better and lawyers are realising that unfounded charges of fraud, reckless justifications, failure to give particulars, intentional mis-statements and other patent defects of pleading do injury to their clients and to their own reputation.

I hope your book will have the success that it deserves and that it will be studied by the members of the profession, judges and practitioners alike.

Again I congratulate you heartily upon the completion of your task.

Yours Sincerely,
GRIMWOOD MEARS

To

P. C. MOGHA Esq.,
Subordinate Judge,
Muzaffarnagar.

PREFACE TO THE FIRST EDITION

The complaints and written statements which have been coming before me during the course of my judicial work have always struck me as singularly lacking in precision and conciseness, the two most important essentials of a good pleading. I have very often attempted to effect an improvement by freely returning pleadings for amendment and by making the party at fault pay heavy costs. But I could not achieve the desired success, partly because I could not bestow so much time to this work as I wanted but more so, because no improvement is possible unless the bar makes a real and earnest endeavour. The apathy of the members of the bar is due not so much to natural conservatism as to the want of a clear knowledge of the correct principles of pleading, due to want of training. The subject is not taught in our law colleges, and also there is a singular absence of a book on pleadings in this country. Certain forms of pleadings were introduced in the Code of Civil Procedure of 1908, but, with the exception of a few forms of complaints in mortgage suits, they have never been followed. Even these forms do not supply the real want because, in the first place many of them are defective and offend against the elementary rules of pleading, and secondly, they cannot be appreciated until the principles of pleading are correctly understood. The Civil Justice Committee also noticed this state of affairs in their report and threw out a suggestion to the legal profession for the preparation of a standard book on pleadings on the lines of the English work by Bullen and Leake.

As I was interested in this subject I at once took up the suggestion. I received great encouragement from the Hon'ble Sir Grimwood Mears in my undertaking, and his kind appreciation of the work and encouragement alone have

enabled me to carry it through and to present it to the profession in the form of this book.

As a thorough grasp of the principles is essential before a lawyer can derive the fullest benefit by a reading of the precedents, I realised that a book written entirely on the lines of Bullen and Leake and containing a sketchy summary of the principles will only serve half its purpose. I have, therefore, devoted sixteen Chapters of this book to a full and exhaustive discussion of the principles of pleading and almost all the case-law on the subject has been digested in them. The portions of the Code of Civil Procedure which relate to pleadings, plaints, written statements, etc., have been incorporated in these Chapters, so that there should be no necessity to refer to any other book on a point of pleading. A Chapter on appeals, and another on applications and affidavits, has also been added, and, it is hoped, will be found useful in every day practice.

In Part II, I have given precedents for different kinds of suits which ordinarily come before the Civil Courts in this country. I have arranged them, for convenience of reference, in alphabetical order according to the various subjects. Explanatory footnotes have also been appended to the precedents. They will be particularly useful for a thorough understanding of the essential requisites of pleadings, in a particular class of cases, and an intelligent study of these notes will enable a pleader to modify the precedents according to his own needs. The exact nature of a particular kind of suit, what should be alleged and proved in such a suit, what possible defences can be raised, and all important points of procedure and practice, have been discussed in these notes. Important questions of Court-fees, valuation and limitation have also been touched upon.

As the drafting of petitions and affidavits is as important as that of plaints and written statements, I have also given precedents of all important applications under the Code of Civil Procedure and other Acts of daily use in Civil Courts.

I have thus spared no pains in making the book really useful for the practitioners, and I hope that if the principles and pleadings are fully and intelligently studied and followed, there will be substantial improvement in the pleadings in Mofassil Courts.

I must take this opportunity of most respectfully expressing my sense of immense gratitude to the Hon'ble Sir Grimwood Mears for the introduction and for all the encouragement and help he has so kindly given me. He has taken a great interest in this work and has, in some instances, made valuable suggestions with regard to the form of precedents.

My thanks are also due to Messrs. Suresh Chandra Chaturvedi and Randhir Singh, Munsifs, for having kindly assisted me in going through the proofs.

MUZAFFARNAGAR
January 23, 1926.

P. C. MOGHA

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PART I

PRINCIPLES OF PLEADINGS

CHAPTER I

Pleadings Generally

Pleadings are statements in writing drawn up and filed by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer. As a rule, in India, there are only two pleadings in a suit, viz. :—

Meaning of Pleadings

(a) A statement of claim, called the “Plaint”, in which the plaintiff sets out his cause of action with all necessary particulars; and

(b) A defence, called the “Written statement”, in which the defendant deals with every material fact alleged by the plaintiff in the plaint and also states any new facts which tell in his favour, adding such legal objections as he wishes to take to the claim.

No pleading subsequent to the written statement of a defendant, other than by way of defence to a claim for set off, can be presented except by leave of the court.¹ Such leave is normally given to a party whose opponent has been permitted to amend his pleading. Such subsequent pleading is called, in the case of a plaintiff, a written statement,² and in the case of a defendant, an additional written statement.

It is for this reason that “pleading” is shortly defined in the Code of Civil Procedure as meaning a plaint or written statement.³

¹ O. 8, R. 9, C. P. C.

² Sometimes called ‘Replication’ or ‘Rejoinder’ also.

³ O. 6, R. 1, C. P. C.

Replication

Under O. 8, R. 9 the Court may require the plaintiff to file a written statement in answer to the pleas of the defendant, but the plaintiff is not as a matter of right, except by way of reply to a set off,¹ entitled to file any such written statement. The Bombay High Court has, however, gone further and held that a court has no power to call for such a written statement from the plaintiff and if it requires the plaintiff's reply to any pleas of the defendant it can have recourse to O. 10, R. 1 alone.² It is submitted with respect that this view is hardly correct. No reasons have been given in the judgment and the second sentence of O. 8, R. 9 which clearly gives this power to the Court seems to have been overlooked.³ The practice of filing such written statements as a matter of course which seems to prevail in some states, is not, however, strictly regular and the plaintiff cannot file it without either express permission or express order of the Court.⁴ The Lahore High Court has ruled that, as this is required only to furnish a better statement, the court has power to reject it.⁵ This written statement is at some places (e. g., in Oudh) called a "replication". This term was formerly used in England where the plaintiff's written statement is now called a "reply". In England Pleading in actions in the High Court of justice is now mainly regulated by the Rules of the Supreme Court 1883 which have the force of a statute. There the practice with regards to a 'reply' differs from that in India. In England the plaintiff is permitted to deliver a reply to the defence without the leave of the court, and, in fact, if he does not deliver any reply all material allegations in the defendant's written statement are deemed to have been denied and put in issue. If he has any new facts to plead, he ought to do so in his reply.

¹ Venkataswami v. Uppilipalayam Vamana Vilasanidhi, Ltd., 153 I. C. 453=1935 Mad. 117.

² Chimawa v. Gangawa, 31 Bom. L. R. 1118, 1929 (Bom.) 413.

³ Chandra Kishore v. Babu Lal, 1949 Orissa 77 (79); Nagratnam v. Kamalatha, 1949 Mad. 299 (300).

⁴ Juvanshingji v. Dola Chhala, 1925 (Bom.) 390 (392) 27 B. L. R. 890; Harish Chandra Bajpai v. Triloki Singh, 1957 S. C. 444.

⁵ Bihari v. Chandu, 1939 (Lah.) 386.

In his written statement the defendant is expected to put forward his defence to the plaintiff's claim and the grounds on which he wishes to defeat it. If he wants to put forward his own claims against the plaintiff, such claims can be of two kinds : those which strictly fall within the category of set-off provided for in Order 8, R. 6 of the Code of Civil Procedure, and those which do not fall within that class. Claims of the former kind can be pleaded in the written statement and will be entertained by way of set-off. Claims of the latter kind are known as counter claims. A counter-claim has always been a creature of statute.¹ Laws in India, except the rules made by the Bombay High Court for its original jurisdiction, make no provision for counter claims. They cannot thus be recognised as such; but can, if put forward in the written statement, be, in certain circumstances treated as a plaint in a cross-suit.²

Counter
Claim

If, however, facts alleged in the written pleading of one party are not, expressly or by necessary implication, admitted or denied by the other party, the Judge is bound, at the first hearing of the suit (and before the settlement of issues), to ascertain from the latter whether he admits or denies them and to record such admissions or denials.³ This may be called *oral pleading*. This is necessary when the defendant has not filed a written statement, as, under the Code, he is not bound to file one unless expressly ordered to do so by the court,⁴ and, also, when some new facts are alleged in the written statement, in which case the issues can not be settled unless it is ascertained whether the plaintiff admits or denies them. It is also necessary when the written pleadings are incomplete or inaccurate. Pleadings therefore also include statements of parties or counsel recorded before the framing of issues for clarification of the points in dispute.⁵

Oral
Pleadings

¹ Halsbury : Laws of England, 3rd. Ed., Vol. 34, p. 410.

² Laxmidas v. Nanabhai, 1964 S. C. 11.

³ O. 10, R. 1, C. P. C.

⁴ Or. 8, R. 1, C. P. C.

⁵ M/s Ganga Ram v. Gyan Singh & Co. A. I. R. 1960 Punjab 209.

These statements are in the nature of supplementary pleadings and no plea inconsistent with them can be raised at a later stage except by way of amendment of pleadings¹. Issues can be framed on such supplementary pleadings and the trial is not vitiated if no formal amendment is made in the written pleadings in the light of oral pleadings.² Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted except as against a person under disability.³ This rule known as the rule of non-traverse does not however apply where no written statement has been filed.⁴ A fact which is admitted need not be proved⁵ but the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.⁶

History of
Pleadings

The method of arriving at an issue by alternate allegations elicited from the parties has been practised in England from the earliest times. At first the pleadings were oral. The parties appeared in open court and *a viva voce* altercation took place before the Judge, whose duty was to superintend or "moderate" the oral contentions. The alternate allegations were so managed as, at length, to arrive at some specific point or matter affirmed on one side and denied on the other, which was agreed to be the question for decision. The parties were then said to be "at issue", and the trial commenced. Only one issue was allowed to be raised, and if a defendant had two defences to an action he was put to election between them; it was only in the reign of Queen Victoria that the parties were allowed to raise more than one issue.

During this parole altercation, one of the officers of the court was busy writing on a parchment roll an official

¹ Mohamed Yahya v. Raham Ali, 117 I. C. 813, 1929 (Lah.) 165.

² Firm of Suraj Singh v. Sardar, 116 I. C. 884.

³ Or. 8, R. 5, C. P. C.

⁴ Binda Prasad v. United Bank of India, 1961 Patna 152; Bhageran Rai v. Bhagwan Singh 1962 Patna 319.

⁵ Jagarnath Upadhyaya v. Amrendra Nath Banerjee, 1957 Cal. 479.

⁶ Proviso to Order 8, R. 5, C. P. C.

report of the allegations of the parties and the acts of the court itself during the proceedings. This was called the "record". The system of oral pleadings gradually fell into disuse, and pleaders began to borrow the roll and entered their statements thereon themselves. Later on, the pleadings began to be drawn up on plain paper and interchanged between the parties; then, after an issue had been arrived at, they were transcribed on the roll.

The principles on which pleadings were framed remained substantially the same till 1852, but the strictness used in their application and the hyper-technicality by which the substantial issues were lost sight of seriously affected their usefulness. An effort was made towards improvement of these matters by provisions of the Common Law Procedure Act, 1852-1860. In 1873, it was found necessary to adopt a more thorough method of reform, and the Judicature Act introduced a system of pleading which, whilst precise in character, is not overloaded with technicalities and works admirably. Yet to-day there are those who say that the reform of 1873 did not go nearly far enough.¹

In India, pleadings have been extremely lax and most inartistically drawn up, except in Presidency Towns where the work is in the hands of barristers assisted by trained solicitors. They are neither concise nor precise, and contain vague, irrelevant and general statements, from which it is difficult to ascertain the questions actually in controversy. This was realized by the Indian Legislature in 1908, and in the Code of Civil Procedure enacted in that year, a few rules of pleading were added, based on the English rules of pleading. These rules are contained in O. 6 of the Code.

Pleadings
in India

But, in spite of the fact that these rules have been on the statute book for so many years, and there has otherwise been a steady improvement in the bar even in the remotest Mofussil courts, no material signs of improvement in pleadings as expected are as yet noticeable. The pleadings

¹ The Elementary Principles of Jurisprudence by G. W. Keeton, 1949 Edition, page 451.

in these courts continue to be the same confused mass of irrelevant and redundant matter, vague and indefinite statements of facts and offensive attacks on the conduct and character of the opponent couched in high-flown and sometimes passionate language, as before. Evidence and arguments are very often stated in addition to, and sometimes even in place of, facts. Propositions of law, inferences from law and presumptions both of law as well as of fact are freely pleaded. Documents are often set out in their entirety when only a mention of their general effect would be sufficient. In spite of this shocking prolixity, some really material points will, not infrequently, be found to be omitted, and others will be found to be stated in such equivocal and ambiguous language that it will be most difficult, if not impossible, to find out from the pleading what exactly and definitely is the case of a party. Evasive language is often employed intentionally to keep the opponent in the dark as to the exact line of attack or defence a party proposes to take, and it was in this art of employing such language in drafting his pleadings that a pleader of the old school used to take the greatest pride, for it was considered as the greatest skill not to commit oneself to any definite case and to draft one's pleadings in such elastic language that any one of the several different cases could be easily built up at the trial, or even at the time of arguments. Those pleaders have now almost disappeared, but the tradition of loose rambling and irrelevant pleading in vogue with that generation of lawyers still persists.

It may be that drafting of pleading is an art. Or that it requires a good knowledge of law. Or that it requires the skill of sorting out material facts from the whole bundle of facts and circumstances brought to the knowledge of the lawyer. But still precision in pleading is not difficult to achieve. A little more attention to the principles of drafting as interpreted by courts and their application to the facts of the particular case will do away with the prevailing prolixity and other defects.

It should not be forgotten that the pleading must state the material facts only. It should not omit to state facts on which the right claimed is based or the facts from which any obligation of the other party arises. Precision in pleadings is not only indispensable but a keynote to success.

The whole object of pleading is to give fair notice to each party of what the opponent's case is,¹ and to ascertain, with precision, the points on which the parties agree and those on which they differ, and thus to bring the parties to a definite issue. The purpose of pleading is also to eradicate irrelevancy.² The parties thus themselves know what are the matters left in dispute and what facts they have to prove at the trial. They are saved the expense and trouble of calling evidence which may prove unnecessary in view of the admissions of the opposite party. And further, by knowing beforehand, what points the opposite party will raise at the trial they are prepared to meet them and are not taken by surprise as they would have been, had there been no rules of pleadings to compel the parties to lay bare their cases before the opposite party prior to the commencement of the actual trial.³

Object of
Pleadings

But, while the courts should always insist on strict observance of the rules of pleading in order to secure the above object to its fullest extent, it would work as a hardship and will result in more harm than benefit, if they were to be too strict in these matters in a country like India, where the art of drafting pleadings is in its infancy. Allowance must be made for the most inaccurate mode of drafting pleadings prevalent in this country, and it would be quite incorrect to look at a plaint in these courts in the same manner as at

Construc-
tion of
Pleadings

¹ Someshwar *v.* Tribhuwan 1934 (P. C.) 130; 149 I. C. 480; Balli Ram *v.* Governor-General, 1946 (Cal.) 249; Maharani Devi *v.* Ram Adhar, 1962 Allahabad 20.

² A Text book of Jurisprudence by G. W. Paton, 1951 Edition, page 478.

³ Sayad Muhammad *v.* Fatteh, 22 C. 324 (P. C.); Thorp *v.* Holds. worth, 3 Ch. D, 637, 639.

a "declaration" in an English court.¹ For the same reason inaccuracy in stating the date of cause of action was held not to justify dismissal of the suit.² In a case for damages for failure to take delivery by the buyer, want of clear averment in the plaint about the seller's readiness and willingness to deliver was not considered fatal.³ But in a case for specific performance of a contract the averment of continuous readiness and willingness was considered essential by the Privy Council.⁴ The Supreme Court, however, made an exception in favour of a case where the defendant had repudiated the contract.⁵

The Courts in India have consistently ruled that pleadings in this country specially in the Mofussil should not be so strictly construed as pleadings in the High Courts.⁶ The Court would be disposed towards a construction which would permit rather than shut out, an adjudication of the real rights of the parties, when from the facts set out, such adjudication may be held to be justified, though not asked for in specific terms or in strict form.⁷ The primary,

¹ *H. H. Nawab Azim v. Amaroo*, 21 W. R. 59; *Kyi Oh v. Ma Thet* 1926 (P. C.) 29, 4 R. 513; *Nishi Kanta v. David Ezra*, 1936 (Cal.) 135.

² *Abdul Shakur v. Rajendra*, 1935 (All.) 759, 155, I. C. 1092.

³ *Arjunsu v. Mohan Lal*, 1937 (Nag.) 345.

⁴ *Ardeshir v. Flora Sassoon*, 1928 P. C. 208.

⁵ *International Controls v. R. K. Suri*, 1662 S. C. 77.

⁶ *Girdhari v. Koolahul* 2 M. I. A. 344; *Secry. of State v. Laxmi Bai* 50 Ind. Appeal. 49, *Kedarlal v. Harilal* A. I. R. 1952 Sc. 47; *Krishna Chandra v. Ram Sahay*, 2 Pat. L. W., 46, 41 I. C. 577; *Azhimanila v. Kayinari* 26 I. C. 337, 1914 M. W. N. 883; *Prayag Das v. Venkama*, 23 M. L. T., 137, 44 I. C. 641, 1918 M. W. N., 346; *Arabar v. Ismail*, 27 I. C. 373; *Dharam Das v. Ranchodji*, 64 I. C. 517; 23 Bom. L. R. 1009; *Vishwanath v. Shankar*, 34 I. C. 704, 12 N. L. R., 90; *Chinku v. Uttam Chand*, 2 Sind L. R. 59; *Chandramani v. Halijennessa*, 9 C.L.J., 464, 4 I. C. 168; *Rattinasabapathi v. Gopala*, 1929 (Mad.) 545, 56 M.L.J. 673; *Manmathnath v. Rakhal*, 142 I. C. 458, 56 C. L. J. 274, 1933 (Cal.) 215; *Ghulam Muhammad v. Samundar*, 165 I. C. 626; 1936 (Lah.) 37; *Zooni v. Salem*, (49) 8 J. & K. L. R. 37; *Jai Kishen V. Mst. Rakhi*, 1950 Himachal Pradesh 12; *Purshotam Das v. Municipal Committee*, 1949 E. P. 301; *Rudra Pratap v. Jagdish Maharaj*, 1956 Pat. 116; *Deep Lal v. Gulabchand*, 1956 Rajasthan 171; *Badat and Co. v. East India Trading Co.*, 1964 S. C. 538 at Page 545, Para 11, Per Subba Rao, J.

⁷ *Mahendra Nath v. Surjmal*, 45 C. W. N. 17.

though not the only, consideration in the construction of pleadings "is, not so much what a careful draftsman would intend to express if he had used the words in question, not what meaning the court or the opposite-party ought to have put on those words, but in what sense, as a matter of fact, the words were understood".¹ A liberal construction should therefore always be put on pleadings, and the intention of the party pleading should be looked to. The court should look to the substance rather than to the wording of a pleading.² Procedure is to subserve and not to govern the cause of justice. A document referred to and relied upon in pleadings may be considered to constitute a part of pleadings.³ A plaintiff's case should not be defeated merely on the ground of some technical defect in his pleading, provided he succeeds on the real issues in the case.⁴ Therefore an erroneous description of the claim is not fatal, and if a claim for money had and received is described as one for damages, the error is not fatal.⁵ Similarly, when a plaintiff sued for possession as a proprietor he was given a decree on the finding that he was a service tenure holder.⁶ In a suit for debts, a plea that the debts were not binding on the *mutt* property as they were not, and could not have been, incurred by the deceased *matadhipati* for the benefit of the *mutt* was held to include both the legitimacy of the purpose for which the debts were borrowed as well as the necessity to borrow the debts.⁷ Relief may sometimes be founded on a plea not directly made but covered by implication. It is necessary that the point was at issue

¹ *Azhimanila v. Kayinari*, 26 I. C. 337, (1914) M. W. N., 883.

² *Atal Buhari v. Barada*, 131 I. C. 529, 1931 (Pat.) 179; *Arun Kumar v. Sudhir*, 1943 (Cal.) 143, 75 C. L. J. 236; *Ram Sarup v. Ram Chandra*, 1949 East Punjab 29; *Kedar Lal v. Hari Lal*, 1952 S. C. 47.

³ *Sharda Ram v. Malik Yashpal* 66 Punj. L. R. 1126. But See. A.I.R. 1967 Assam 74 *Niranjan Lal Ratan Kumar v. R. S. N. Co.* contents of protest note referred to in W. S. treated as not pleaded.

⁴ *Dharam Das v. Ranchhodji*, 64 I. C. 517, 23 Bom. L. R. 1009.

⁵ *Herpal v. Ram Sarup*, 34 I. C. 173 (All.).

⁶ *Jokhan v. Mahesh*, 27 I. C. 720, 13 A. L. J. 160.

⁷ *Lakshmindra v. Vibhudapriya*, 17 L. W. 274, 44 M. L. J. 187, 1923 (Mad.) 288.

and the parties knew that the plea was involved in the trial. In a case where the plaintiff failed to prove tenancy a decree for ejectment was passed on the ground of defendant's possession living by leave and licence. It was deemed implied in the plea that he was in possession under an agreement.¹ Similarly, where the question is whether a person is sued in a representative capacity or in personal capacity, the mere fact that the cause title does not describe his representative capacity is immaterial, but the whole plaint should be read and the conduct of litigation looked to.² The pleading should be taken as a whole for determining its true import.³ But where the plaintiff was a practising lawyer and was represented by another lawyer it was held that his pleading should be strictly construed.⁴ The Calcutta High Court has held that though there may be some reason for saying that pleadings in this country are not to be strictly construed, yet at the same time there is no reason why the parties should be allowed to ignore altogether the rules of pleadings which have been laid down in the Code of Civil Procedure.⁵ The leniency of the Court in the construction should be no encouragement to pleaders in disregarding rules of pleading.

Duty of
Court

For the same reasons for which courts in the Mofussil in India are enjoined not to be very strict in their construction of pleadings, it has been laid down that "the responsibility of clearly perceiving and raising points, which arise upon the pleadings and evidence, and the proper adjudication of which is essential for the ends of justice, rests on the court as much as on the parties or their pleaders."⁶ This duty is recognized by statute by the enactment of a provision that, at the first hearing, the court shall ascertain from each

¹ Bagwati Pd. v. Chandra Maul A. I. R. 1966, Sec. 735.

² Bidhu v. Kulada, 46 C. 877, 50 I. C. 525; Sonachalam v. Kumara-velu, 54 M. L. J. 587, 1099 I. C. 199, [1928] Mad., 445.

³ Niehlal Bhai Vallabh Bhai v. Jaswant Lal Zine Bhai A. I. R. 1966 S.C. 997, Rangn Vithoba A. I. R. 1967 Bom. 382.

⁴ Raman v. U. B. Thit, 1933 (Rang.) 357. Firm Ram Sahai v. Vishwanath Pd. A. I. R. 1963, Patna 221.

⁵ London and Lancashire Co v. Binoy, 1945 (Cal.) 218.

⁶ Per Westropp. C. J., in Apaya v. Rama, 3 B., 210.

party whether he admits or denies such allegations of facts as are not expressly or by necessary implication, admitted or denied by him¹, and of a further provision under which the court is empowered to examine the parties before settlement of issues to find out what the actual controversy between them is². When the question is whether a party should be held bound by an admission in his pleadings, it is the duty of the court to look to the pleadings as a whole and not to dissect a fact out of the pleadings.³ Extensive powers have further been given to the courts to strike out pleadings or to order their amendment,⁴ and to call for written statements or further written statements.⁵ When the pleadings are vague, the court has also power to order further and better particulars.⁶ The Oudh Chief Court strongly impressed on the courts the duty to clarify the pleas contained in a written statement which was too vague and too general to indicate what was meant by the defendant even if no attempts are made by the plaintiff to seek such clarification.⁷ Unfortunately, courts do not, at present, make so free and extensive a use of these powers as is necessary, and the result is that the issues are enlarged and irrelevant evidence is often introduced, the real issue being sometimes lost sight of. If these powers are carefully and extensively exercised, much of the evil effect of bad pleading would be avoided. In fact this is not merely a matter of discretion; it is the duty of the court to find out accurately the real points of controversy between the parties and to adjudicate upon them, and not to pass technical orders on technical points, for that means denial of substantial justice. As remarked by Bowen, L. J. "Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."⁸

¹ O. 10, R. 1.

² O. 10, R. 2.

³ *Shiv Saran Rai v. Sukhdeo Rai*, 171 I. C. 317, 1937 (Pat.) 418; *Dular Singh v. Sitaram*, 171 I. C. 1937 (Nag.) 184.

⁴ O. 6, Rr. 16 and 17.

⁵ O. 8, R. 9

⁶ O. 6, R. 5.

⁷ *Faquir Bux v. Thakur Prasad*, 1941 (Oudh) 457, 194 I. C. 588.

⁸ *Cropper v. Smith*, 26 Ch. D., 700.

Courts in India have no power to non suit the plaintiff merely because the pleadings are not in proper form or the claim is wrongly described or the section wrongly given. It was held by the Allahabad High Court in *Somnath Singh v. Ambika Prasad Dube*, (1950 All. 121) that where a party pleads and proves all necessary facts, it is for the court to draw the legal inferences from them. A party need not plead them. It is for the court itself to find out and examine all pleas of law that may apply to facts.¹

It is also the duty of the judges to master the principles of pleading and to see that the rules are obeyed in their courts, and specially endeavour to save public time by not allowing counsel to travel "outside the record", that is to say, not to give evidence which goes beyond any of the particulars in the plaint or written statement. This matter has, on more than one occasion, been the subject of discussion in the Allahabad High Court, and an opinion has been expressed that the High Court will uphold judges who refuse to allow evidence to be given in plain violation of the rules of pleading. For example, if a plaintiff has given in his particulars of fraud, three distinct grounds, it would be the manifest duty of the court to interpose and exclude any evidence of a fourth ground of which no mention is to be found in the plaint. This fact should be carefully considered by pleaders who are not likely to obtain any redress on appeal in any court, if through oversight, ignorance or negligence, they have omitted to include in their particulars any ground on which they wish to rely at the trial. Unfortunately the judges of the mofussil courts very often ignore their duty and do not take the trouble of examining the pleadings not so much because they have no time to do so as because they themselves are ignorant of the correct principles of pleadings. Sometimes an Hon'ble Judge of a High Court gives expression to his feelings on the subject, but however strongly he might express them, experience has shown that

¹ *Kedarlal Seal v. Harilal Seal*, 1952 S. C. 47; *Gulzar Ahmad v. Govt. of U. P.*, 1950 All. 212.

it has little effect on the subordinate courts or the bar. The Hon'ble Chief Justice of the Allahabad high Court expressed himself strongly on this point in *Gauri Shankar v. Manki Kuwar*, (21, (1923) A.L.J. 571, 74 I. C. 466) but the judgment appears to have been forgotten by everyone. In 1930 the Hon'ble Mr. Justice Lort Williams of the Calcutta High Court strongly emphasized the need of careful study of the art of pleading and condemned the shocking pleadings which are filed even in the Calcutta High Court,¹ The judgment of the Hon'ble Judge is worth careful perusal by all the Judges and members of the bar. It is the duty both of the judges and lawyers in original courts to see that pleadings are properly framed.²

Though the courts do, for the sake of justice, apply liberal rules of construction to Indian pleadings and though it is the duty of the courts to clear up ambiguous and obscure pleadings and to find out the real points at issue by exercising their various powers in this behalf, yet all that does not absolve the pleaders from their initial responsibility of drafting clear and correct pleadings. A bad and careless pleading is often apt to spoil the case of a party beyond redemption, and even if the judge is inclined to stretch every point in his favour to rectify the mistake of the pleader, it certainly always involves the client in unnecessary expense, for no substantial amendment can be allowed except on strict terms. It is, therefore, the duty of every pleader to take extreme care in drafting his pleadings. No doubt, he will gain much by experience, but a thorough understanding of the rules of pleading is essential to start with. He should, before proceeding to draft a plaint or a written statement, not only make himself acquainted with all the detailed facts of the case, but should also carefully and thoroughly study the law bearing on the subject, for it does not infrequently happen that, through want of accurate knowledge of the law,

Duty of
Pleaders

¹ *Ram Prasad v. Hazarimall*, 134 I. C. 338, 58 C. 418, 1931 (Cal.) 458.

² *Sumant Prasad v. Ram Sarup*, 1946 All. 204.

a pleader pleads matters which are wholly unnecessary and thus involves his client in the expense and trouble of proving them, or omits matters which are the essentials of his claim or defence, thus very often making his client lose the case without any fault of his own. In *Attorney-General of Colony of Fiji v. J. P. Bayly Ltd.*, (1950 P. C. 73) their Lordships of the Privy Council pointed out the duty of the pleaders to state claims with particularity.

Funda-
Mental
Rules of
Pleading

The fundamental rules of pleading in England, on which the provisions of O. 6 of the Indian Code are based are four, viz.—

1. Every pleading must state facts and not law.
2. It must state all the material facts, and material facts only.
3. It must state only the facts on which the party pleading relies, and not the evidence by which they are to be proved; and,
4. It must state such facts concisely but with precision and certainty.

Each of these rules is so important that it deserves a separate chapter for discussion.

CHAPTER II

Facts, not Law

The first fundamental rule of pleadings, is that neither provisions of law nor conclusions of law, nor conclusions of mixed law and fact, should be alleged in a pleading.¹ The pleadings should be confined to facts only, and it is for the judge to draw such inferences from those facts as are permissible under the law, of which he is bound to take judicial notice. A Judge is bound to apply the correct law and draw correct legal inferences from facts, even if the party has been foolish enough to make a wrong statement about the law applicable to those facts. It is a mistake to think that the Judge is not bound to consider, or rather is bound not to consider, any view of the law in respect of the fact before him except such as is laid before him formally by the parties.² If a plaintiff asserts a right in himself without showing on what facts his claim of right is founded, or asserts that defendant is indebted to him or owes him a duty, without alleging the facts out of which such indebtedness or duty arises, his pleading is bad.

First rule
of Pleading

Though this rule is nowhere stated in the Code of Civil Procedure in so many words, yet it follows from the injunction laid down in O. 6, R. 2, that a pleading shall contain *only a statement of material facts*. The rule is hardly appreciated in the Mofussil, and possibly the one rule of pleading which is more neglected than others, it is certainly this rule.

It is common to plead that the plaintiff is the legal heir of the deceased. This is an inference of law what the

¹ Purshottam v. D. Ghee Co., 1961 A. P. 143.

² Gaura v. Sri Ram, 1926 (Nag.) 265; Narayandin v. Mahesh Singh, 1926 (Nag.) 313, 93 I. C. 103; Somnath Singh v. Ambika Prasad Dube, 1950 All. 121.

plaintiff should show is how he is connected with the deceased. He should also account for other relations who were nearer to the deceased than the plaintiff. It is bad pleading to allege that the plaintiff is entitled to get certain money from the defendant. Facts from which title to the money can be inferred should be alleged, e. g., that the plaintiff had lent the money to the defendant, or that the plaintiff had sold his goods to the defendant and the latter had promised to pay him the price on a certain date but had not paid it. It is equally bad to say that the defendant was bound to render accounts to the plaintiff. Facts making the defendant an accounting party should be clearly alleged, e. g., that the defendant was the agent of the plaintiff for purchase and sale of grain. It is not sufficient to say that the plaintiff is entitled to a right of way over the defendant's land; he should show how he is entitled to that right, whether by grant, prescription, or an easement of necessity, or otherwise. Even that would not be sufficient; he should set out the facts upon which he relies as entitling him to the particular kind of easement.¹ He must, for example, state that the defendant's deceased father had in consideration of Rs. 500, granted to him, by a deed, dated January 5, 1905, a right to pass over the land; or that the plaintiff has been passing over the land in going from his house to the public road for more than 20 years before the suit, as of right and without interruption; or that the plaintiff and defendant were joint owners of the land in suit, that at a partition held in 1920, that land was allotted to the defendant, that the way of the plaintiff always lay across the land, and that there is no other possible way through which the plaintiff can go from his house to the highway. In this connection it may be remarked that the form of plaint in a suit for obstruction to a private right of way given in the Code of Civil Procedure (Form No. 25, Appendix A) is defective and offends against this rule of pleading.

¹ *Farrell v. Coogan*, 12 L. R. Ir. 14; *Numia Mal v. Mahadeo*, 1962 (Punj.) 299, relying on *Harins v. Jenkins*, (1882) 22 Ch. D. 481 and *Spedding v. Fitzpathick*, (1838) 38 Ch. D. 410.

It is not sufficient to allege that the defendant was guilty of negligence. Facts on which the defendant's duty, neglect of which is pleaded, is based, as also the facts which constitute, in the plaintiff's opinion, a breach of that duty should be alleged, and it should be left to the court to infer from them that the defendant has been guilty of negligence. It is not proper to plead that plaintiff is entitled to the property under a sale-deed from A. He should allege that A was the owner of the property, and that he sold it to the plaintiff by executing a registered sale-deed in respect of it on such and such date.

Similarly it will not be sufficient to say that Abu Muhammad made a gift of his property to the plaintiff. The plaintiff should allege how the gift was made, how it was accepted, and how possession was delivered, because these are the facts which constitute a valid gift under the Muhammadan Law, and to allege the gift merely would be to state a conclusion of law from facts which are not stated.

If facts are not stated in the plaint, it shall be held to be bad in spite of allegations of inferences of law which the plaintiff draws from those facts, e. g., even if it is alleged that the particular act complained of was done "unlawfully", "wrongfully" or "improperly", that would not be sufficient unless facts are alleged from which the plaintiff draws the inference that the act was unlawful, wrongful or improper.¹ The plea that the "suit is misconceived" is bad, as facts should be pleaded from which the defendant claims to draw this inference of law.²

Similarly, the defendant is not, in a suit for price of goods sold to him, entitled to plead that he is not liable. He should allege that he did not purchase the goods, or that they were never delivered to him, or that they were not of the quality ordered, or that they were sold on credit which

¹ *Gautret v. Egerton*, 16 L. J. 17; *Day v. Brownrigg*, 48 L. J., Ch. 173.

² *Shripada v. Divitia*, 1948 Bom 20; *Gulzar Ahmad Zafri v. Govt. of U. P.*, 1950 All. 212.

has not yet expired. In a suit for damages for an alleged libel, it is not sufficient to plead that the defendant published the libel on a privileged occasion. He must set out the facts and circumstances on which he relies as creating the privilege.¹ So, a defence that Sec. 41, Transfer of Property Act, protects the defendant is not good. The defendant should plead that he had taken the property for consideration from a person who was the ostensible owner of it, and that he, in good faith, believed him to be the owner. Where the plaintiff expressly pleaded that a certain temple was dedicated for worship by the general public the defendant merely pleading temple to be private, the finding that temple was dedicated to the members of the family was not justified.²

stances
of bad
leading

The following are some of the other instances of pleadings offending against this rule which are frequently found in India and which do not ordinarily strike the Indian pleader as being wrong :

(a) The plaintiff *is the heir* of the mortgagor and the defendant *is the heir* of the mortgagee, hence the *plaintiff is entitled to redeem* the mortgage, and the defendant *has no legal right in the property but to take his mortgage money*. (Inference of law and propositions of law family connection of both should be shown.)

(b) The mortgage was made for a *legal necessity* and *is binding* on the son of the mortgagor. (The exact necessity should be specified, second sentence is an inference of law).

(c) The defendant has been in possession of the mortgaged property and *is liable to render account of the income and expenditure*. (The liability, being statutory need not be pleaded.)

(d) The plaintiff being a reversioner is not legally bound by the transfers made by the Hindu widow in favour of the defendant. (A proposition of law). How he is reversioner should be shown.

¹ Simmonds Dunne, Ir. R. 5, C. L. 358; Elkington v. London Association, 19 [11], 27 Times L. R. 329.

² Deokinandan v. Murlidhar, 1957 S. C. 133.

(e) The mortgaged property belonged to a joint Hindu family, the second defendant had no right to transfer the family property to the first defendant without the plaintiff's consent. (A proposition of law).

(f) For the above reasons, the plaintiff's suit *is liable to be dismissed*. (An inference of law).

(g) The mortgage-deed in suit is void and is of no effect in law. (Facts making it void and ineffectual should be pleaded).

(h) The property is the *stridhan* of A. B. (This is a conclusion of law; facts making the property the *stridhan* of AB should be stated).

But, while the strict rule of pleading requires that such legal inferences should never be pleaded, and no accurate and careful pleader will plead them, still sometimes in addition to the facts which are clearly pleaded, the inference is also pleaded, either for the sake of clearness or for convenience, as that sometimes makes the statements of facts more intelligible and shows their connection with each other. This has been tolerated in England, as the pleading is, at the most, unnecessary, and does not affect or in any way embarrass the other party. For example, in a suit on a hypothecation bond, if the defendant pleads that the bond was not attested by two witnesses, and *does not therefore amount to a mortgage*, the pleading may strictly be against rules, yet it may be tolerated.

Tolerable
Pleadings

It must, however, be clearly remembered that in no case should a mere inference of law be pleaded without pleading the facts. When facts from which an inference of resettlement could justifiably be raised are set out in the plaint the absence of specific pleading as to resettlement is not prejudicial to the defendant.¹

But the rule against pleading law is restricted to that law only of which a court is bound to take judicial notice. As the court does not take judicial notice of foreign law, or

Pleadings
Foreign
Law and
Custom

¹ Gunendra Nath v. Satish Chandra, 1953 S. C. 42.

of particular customs or usages of trade, they should be pleaded like any other fact, if a party wants to rely on them.¹ If a party relies on a usage at variance with the Contract Act he should plead the usage with particulars about its incidents and details.² If it is not pleaded no evidence to prove it will be admitted.³ A custom which has repeatedly been brought before the courts, and has been recognized by them regularly and has thus acquired the force of law, need not be pleaded.⁴ For instance, the custom amongst Jains in India, except Madras and the Punjab, authorizing widows to adopt without husband's authority is presumed and need not be pleaded and the party alleging local or family custom is bound to allege and prove it.⁵

Legal pleas

Nor should this rule be considered as excluding legal pleas to a suit, or pleas denying the legal right claimed by the opposite party. If a plaintiff claims as an heir on the ground of certain relationship, the defendant may take a legal plea that the plaintiff is not the heir, even assuming the alleged relationship to be correct. In a suit by a landlord for arrears of rent if a defendant denies the plaintiff's title, the plaintiff may plead an estoppel under Section 116, Evidence Act, against the defendant's plea. Similarly, pleas in bar of suit, e. g., of limitation, *res judicata*, etc., may be raised. Such pleas are "objections in point of law" and raise what are called Issues of Law.

A little relaxation of the rule discussed under this chapter will be advisable because of the changes in laws. The fast changing pattern of society has imposed a duty upon the

¹ Vishwanath v. Ram Narain, 1940 (All.) 405, 190 I. C. 109.

² Sital Prasad v. Ranjit Singh 1931 A. L. J. 390 1931 (All.) 583.

³ Brahadeeswara v. Rajagopal 1947 Mad. 71, 1946—2 M. L. J. 173, 1946 M. W. N. 591.

⁴ Banarsi Das v. Sumat Prasad, 164 I. C. 1047, 1936 A. L. J. 1237. 1936 A. W. R. 857, 1936 (All.) 641; Dasharathlal v. Bai Dhondubai, 1941 (Bom.) 262, 195 I. C. 464; Rasool v. Ramzan, 1954 All. 270 (custom of privacy) Ballu v. Thakur Dan Singh 1950 A. L. J. 234; (1951) 2 All. 559-1950 A. W. R. (Custom of pre-emption in Kumaun); Ujagor Singh v. Mst. Jeo, 1959 S. C. 1041.

⁵ Mangibai v. Sugan Chand, 1948 P. C. 177, 1948 A. L. J. 255.

Legislature to enact such laws (conferring authority for delegated legislation) as may meet the requirements of the changed circumstances. A reference to such laws in the pleading will not in most cases amount to 'Objection in point of law'. Still such a reference cannot be said to violate this rule of pleading. In any case the courts will do well to tolerate it in the interest of justice.

CHAPTER III

Material Facts

Second
rule of
Pleadings

The second fundamental rule of pleading is that every pleading shall contain, and contain only, a statement of the material facts on which the party pleading relies for his claim or defence.¹ The rule requires :

(1) that the party pleading must plead *all* material facts on which he intends to rely; and

(2) that he must plead *material facts only*, and no fact which is immaterial should be pleaded nor the evidence.

Their Lordships of the Privy Council have pointed out that the rule that all material facts should be pleaded is no mere technicality and that an omission to observe it may increase the difficulty of the court's task of ascertaining the rights of the parties.² In this case the plaintiff had alleged that he was "entitled to get free supply of water for wet crops raised" on the land "irrespective of the nature of the crops", but the facts on which he relied as the foundation of his right were not set out in the plaint. It is submitted that this pleading was bad also because an inference of law was pleaded. The legal inference should be left to be drawn by the Courts.³

What are
material
facts

The first question is what facts are material. Every fact is material for the pleading of a party, which he is bound to prove at the trial (unless admitted by the other party) before he can succeed in his claim or defence. Facts which are not necessary to establish either a claim or a defence are not material. It is, therefore, obvious that the question whether a particular fact is or is not material depends mainly

¹ O. 6, R. 2.

² *Gopala Krishnayya v. Madras Province*, 1947 P. C. 132.

³ *Gouridutt Ganeshi Lal v. Madho Prasad A. I. R.*, 1943 P. C. 147.

on the special circumstances of the case. it is the most important question in every case, though not always easy to answer.

There is a thin line of distinction between a material fact required to be given under O.VI R.2 and the particulars required to be given under O.VI R.4 & 6 C.P.C. as pointed out in Ch. VI of this book. All the same a distinction exists. Before giving particulars the specific act of the other party constituting the material fact must be alleged. For example in a suit for specific performance of contract the plaintiff must allege that he was willing and is still willing to perform his part of the contract. The failure to do so may result in the dismissal of his claim.¹ Similarly in a suit where the transaction is said to be Benami, it must be specifically alleged that so and so was his Benamidar.² In a suit for infringement of patent right it is necessary to allege, besides giving particulars of the said infringement that the plaintiff had a patent right under Patent No....Condition precedent whether imposed by law or agreement must be specific though not its performance.

Before drafting his pleading, it is necessary for the pleader to master the law relating to the case in all its details and then he must apply his knowledge of the law, and his own common sense, to the facts of the case as narrated to him by his client, and decide which of the facts are material and must be pleaded and which are immaterial and must be omitted. If he is in reasonable doubt about a particular fact, it would perhaps be better for him to plead it than to omit it for, if afterwards it turns out that the fact was material he cannot be allowed to prove it, unless he can obtain leave to amend his pleading, which may not be granted or granted on strict terms as to costs.

After the pleader has made up his mind what facts he has to plead, he should put them together and inquire whether, if all those facts were proved, his client would be entitled to a decree. If he can return an answer in the affir-

Test to be applied

¹ *Sanga Thevar v. Thanukedi Ammal* A.I.R. 1954 Mad. 116,

² *Jagmohan Das v. Kishan* A.I.R. 1957 Hyd. 37.

mative, he should then take up each fact and inquire whether, if he failed to prove that fact, his client could still succeed. If he could succeed, even without proving that fact, the fact should be eliminated, and what facts remain after such elimination would be the material facts which the pleader is bound to plead. If he finds that the facts he intends to plead would not, even if all of them were proved, result in the success of his client, and any further fact has to be proved, that further fact should also be pleaded.

Instances
of imma-
terial facts

The modern pleadings in the Mofussil will be found to be full of allegations of immaterial facts which should not be pleaded. For instance, in a suit for money due on a promissory note payable on demand, it is not necessary to allege that the plaintiff demanded the money and the defendant refused to pay it because the money is payable immediately and no demand is necessary before suit.¹ In a suit for ejectment against a trespasser it is unnecessary to allege that the defendant was asked to vacate the house but he refused to do so. In a claim for money lent, it is unnecessary to plead that the money was lent at the request of the defendant, or because the plaintiff had implicit confidence in the honesty of the defendant, or because the defendant was in straitened circumstances and had been recommended to the plaintiff by common friends. In a suit for price of goods sold to the defendant, it is not necessary to allege that the goods belonged to the plaintiff, nor in a suit for arrears of rent against a tenant, is it necessary to plead the plaintiff's title to the property, for the defendant cannot deny it. Similarly, allegations of hostility between the parties or collusion between the opposite party and the enemies of the party pleading are not material. The Supreme Court has held that the plea that the evidence in support of the other parties case is unreliable need not be taken in pleadings.² It is unnecessary to state that the defen-

¹ *Meghraj v. Johnson*, 11 N. L. R. 189; *S. K. Jamu v. Mohd. Ibrahim*, 1926 (Nag.) 194; *Secretary of State v. Prasad Bapuli*, 46 M. 259 (288, 289). *As to when demand is necessary before suit*, see Chapter XII.

² *Girje Nandini Devi v. Brijendra Narain Choudhary*. A. I. R. 1967 S. C. 1124.

dant has trespassed on your land at the instigation of your enemies, or because the defendant owes you a grudge and wants to tease you. In Bengal, it is usual to allege that the defendant has not paid *in spite of his ability to pay*. The ability or inability to pay is not a material fact. In a suit for damages for assault, it is not material to allege the conviction of the defendant for the offence by the criminal court. In a suit for damages for a trespass on the plaintiff's property, it is not material to allege similar acts of trespass committed by the defendant before. It is also not material to allege that the defendant is a man of great influence in the village and the plaintiff is a poor and helpless *ryot*. In an action by a creditor against a surety, there is no need to allege that the creditor gave the surety notice that the principal debtor had not paid. Sometimes it is also alleged in the plaint that the plaintiff files the *bundi* or pronote or copy of an account with the plaint. It is not necessary to allege that in the plaint.

A defendant need not plead to the prayer in the plaint nor to any matter which merely affects costs.¹

On the other hand, in a suit for injunction, it is material to allege that the defendant "threatens and intends" to repeat the illegal act.² Where words of praise are spoken ironically so as to convey a defamatory meaning, it must be alleged that they were so intended and understood. When collusion is alleged between A and B, the fact that A knew the improper motives which actuated B is material.³

Instances
of material
facts

Where a suit is brought under a particular statute, all facts necessary to bring it under that statute must be alleged. When the rule of law applicable to a case has an exception to it, all facts are material which tend to take the case out of the rule or out of the exception. Where a party claims the benefit of a special rule of a particular school of

¹ Odger's Pleading, p. 121 (9th ed.)

² *Standard v. Vestry of St. Gile's*, 20 Ch. D., p. 195, 46 L. T. 243.

³ *British etc. v. Britannica etc.* 59 L. T. 888.

Hindu or Muhammedan law, he should plead facts which would cause those rules to apply. For instance if a childless Muhammedan widow claims a one-fourth share in the property of her husband as allowed by *Shia* law, she must allege that her husband was a *Shia*.

Effect of
document

Whenever the contents of a document are material, it shall be sufficient in any pleading to state the effect thereof, as briefly as possible, without setting out the whole or any part thereof, unless any precise words are material.¹

For instance, if a plaintiff, bases his claim on a sale-deed, it is sufficient to say that A has sold the property to him by a deed, dated—. He need not state the words of the deed which amount to a transfer of the title. At the same time, it is not enough to say that he is entitled to the property under a deed dated—, because this does not state the *effect* of the document.² But in an action for libel, the exact words which are said to be libellous will have to be stated.³

If a person, not party to a deed, is entitled to show that the real intention of the parties to the deed which appears to be a sale was to create mortgage, he should definitely plead such intention and it will not be sufficient merely to plead that the plaintiff is only a mortgagee.⁴ This, it is submitted, is too strict a view and the defendant, on his pleading that plaintiff was a mortgagee, should have been allowed to show how under a deed which was a sale the plaintiff was only a mortgagee.

Damages

How far allegation of damages sustained and other facts affecting damages are material and should be alleged in the pleadings is another question for consideration. Damages are of two kinds : (1) General damages and (2) Special damages. *General damage* is such as the law will presume to

¹ O. 6, R. 9.

² *Philips v. Philips*, [1878] 4 Q. B. D. 127.

³ *Harris v. Warre*, (1879) 4 C. P. D. 125.

⁴ *Rangubai v. Govind*, 1949 Nag. 243.

be the natural or probable consequence of the defendant's act. It need not be proved by evidence, e.g., in an action for trespass or libel or slander by words actionable *per se*, damages are allowed without any proof. *Special damage* is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends, in part at least, on the special circumstances of the case. It must always be proved at the trial that the loss was incurred, and also that it was the direct result of the defendant's conduct. In many cases, proof of special damage is essential to sustain an action, e. g., a person has no right of action in respect of a public nuisance unless he can show some special injury to himself, which is over and above what is common to others.

It will therefore be readily seen that special damage must always be alleged in the pleadings as any other material fact. It is material because it is required to be proved by evidence, and no decree can be passed for it unless it is proved (or admitted). Facts, with necessary particulars, must be mentioned to show what special damages the plaintiff suffered, and that they were the direct consequence of the defendant's act.

General damages need not be pleaded specifically, nor is any evidence necessary to prove their amount. Such general words as "whereby the plaintiff has been injured in his credit and reputation" or "whereby the plaintiff has suffered damage" are sufficient. But, strictly speaking, even these general words are not necessary. In such a suit, the plaintiff might only allege facts and end with the prayer for award of damages.

In cases when general and special damages are both claimed, the latter should be specifically pleaded, with particulars; for instance in a suit for malicious prosecution, in which both the general damages for loss of reputation and mental and bodily pain as well as special damages, e.g., cost of defence, loss of professional business, etc., are claimed.

But in either case it is not necessary for the defendant

to plead to damages.¹ The question of damages shall be considered to be put in issue in all cases without any pleading by the defendant. If, however, facts are alleged in the plaint which are material only as proof of the special damage claimed, and the defendant means to deny those facts, he had better do so, as that would at once give notice to the plaintiff of what the defendant means to challenge, but as the defendant is not legally bound to do so, his omission to deny any such fact would not amount to an admission by implication under O. 8, R. 5, C. P. C.

Facts in
aggrava-
tion of
damage

In order to ascertain the nature and extent of the injury done by the act for which the plaintiff claims general damages, it is often material to consider the circumstances under which the wrongful act was committed. Thus, in an action for trespass, the fact that the defendant entered the plaintiff's house with a false charge that plaintiff had got stolen property therein, is material as increasing the amount of damages;² so also in a suit for damages for breach of contract to marry, is the fact that plaintiff allowed herself to be seduced on the faith of the promise.³ Such facts are called "*matters in aggravation of damages*." Similarly, facts which tend to decrease the amount of damages are known as "*matters in mitigation of damages*." These facts are not, strictly speaking, material to the cause of action or to the defendant's defence, but are allowed to be proved only as affecting the amount of damages. In England, "facts in aggravation of damages" are allowed to be pleaded on the ground that they are material facts on which the plaintiff relies for his claim to specially heavy damages.⁴

The same rule should apply in this country also, as, under O. 6, R. 2, C. P. C. all material facts on which a party relies for his claim or defence should be pleaded in his pleading. The subsequent provision in O. 7. R. 1 has, however,

¹ O. 8, R. 3.

² *Bracegirdle v. Orford*, 2 M. & S. 77.

³ *Milington v. Loring*, 6 Q. B. D. 190.

⁴ *Milington v. Loring*, 6 Q. B. D. 190; *Whitney v. Moignard*, 24. Q. B. D. 630; *Bracegirdle v. Orford*, 2 M. & S. 77.

made some people entertain a doubt on the point. While laying down what a plaint should contain, that rule provides that it shall contain a "statement of the facts constituting the cause of action." No doubt, facts in aggravation of damages cannot strictly be said to constitute the cause of action for a suit, but it must be remembered that this rule is not prohibitive. It does not say what a plaint should not contain, but only lays down what it should. That does not necessarily imply that facts other than those mentioned in the rule should not be stated in the plaint, and when O. 6, R. 2, definitely provided that a pleading should contain all the material facts on which the party pleading *relies* they should be stated (whether they constitute the cause of action or not).

As to *facts in mitigation of damages*, they should be governed by the same rule as facts in aggravation of damages, because there is no reason why, if the latter are allowed to be pleaded, the former should not. Just as the latter are material facts on which the plaintiff relies for his claim, the former are also material facts on which the defendant relies for his defence. Under the general provision of O. 6, R. 2, therefore, they should also be stated in the defence. In England, they are not allowed to be pleaded, because of the statutory prohibition in O. 21, R. 4, of the English orders which in express terms, provides that "no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted". This rule has not been reproduced in the Indian Code, and O. 8, R. 3, C. P. C., which is the nearest approach to it, simply lays down that the rule that a defendant should specifically deny every allegation of fact of which he does not admit the truth, does not extend to the plaintiff's allegation of damages. The plaint allegations regarding damages need not be denied by the defendant and the omission to deny them will not therefore be taken to amount to an admission of the allegation under O. 8, R. 5. But neither Rule 3, nor any other

Facts in
mitigation
of damages

rule, lays down that a defendant should not, or need not, state in his written statement the additional facts on which he relies in mitigation of the damages claimed from him. The fact that a defendant does not plead facts in mitigation of damages will not, however, bar the court from considering them when assessing damages.¹

Even in England, the injustice of permitting the defendant to produce evidence of facts in mitigation of damages to the surprise of the plaintiff has been recognised in O. 36, R. 37, under which no such evidence is receivable, without the leave of the court, unless, at least 7 days before the trial, the defendant furnishes particulars to the plaintiff of the matters as to which he intends to give evidence. There is no such rule in India, because none is necessary, as such facts are not excluded from the pleadings here as they are in England.

The result is, that all facts affecting damages should be stated in the pleadings of the plaintiff and the defendant in this country.

Facts not
material at
the present
stage

Having seen what facts are material, it must further be remembered that no fact should be alleged in the pleading which is not material at the present stage of the action, although it may become material at a later stage, e.g., in view of the objections of the other party. It is not necessary to anticipate the answer of your opponent and to state what you would have to state in answer to it. To do so, in the words of Hales, C. J., is like "leaping before one comes to the stile." and would be a return to the old inconvenient system of pleading in Chancery when the plaintiff used to allege in his bill imaginary defences and make charges in reply to them.²

For instance, in a suit on a contract it is unnecessary to plead that the defendant was of full age when he entered into it.³ In an action for libel it would be bad pleading for

¹ *Jansa v. S. K. Banoo*, 161 I. C. 593, 1936 (Nag.) 70.

² *Rassam v. Budge*, (1893) 1 Q. B. 571.

³ *Walsingham's case*, Plowed, 564; *Sir Ralph Boney's case*, Vent 217.

the plaintiff to allege in his plaint that the defendant will contend that the words are part of a fair and accurate report of judicial proceedings but it is not so. It is also bad pleading in a suit for trespass to allege in the plaint that the defendant committed the trespass under colour of a sale-deed alleged to have been executed by the plaintiff, but that the said deed had never been registered and is otherwise void. But if you know for certain the cover under which the defendant has committed the trespass and the defendant, has previously to your suit, asserted his right under that cover, there is no harm in pleading facts showing that the defendant's act under that cover was not justified. For instance, if a person takes a lease of joint family lands from a junior member of the family and takes possession of the land expressly under that lease and gets his name recorded in the village records on the basis of that lease, the head of the family can sue him for ejectment and allege facts showing that the lessor had no authority to grant the lease and that it is not binding on the other members.

The general rule, that all material facts, and material facts only, should be pleaded, is subject to the following three exceptions :—

Exceptions to the general rule:—

(i) The performance or occurrence of any condition precedent need not be alleged, as its averment shall be implied in the pleading. If the other party means to contest the performance or occurrence of such condition, he is bound to set up the plea distinctly in his pleading.¹ For instance, A agrees to build a house for B at certain rates. It is a condition of the contract that payment should only be made upon a certificate of B's architect that so much is due. In a suit for money due to A, the obtaining of architect's certificate is a condition precedent to A's right of action. In this case it is not necessary for A to allege that he has obtained the certificate. If B intends to contest the fulfilment of this condition, he should distinctly plead it. Under Section

(i) Condition precedent

¹ O. 6, R. 6, C. P. C.

54 of the Cess Act (Bengal Act IX of 1880), a notice is a condition precedent to the liability to pay cess. A suit was brought for recovery of the cess but no allegation of the notice having been issued was made in the pleading nor was any plea raised in the written statement. The defendant was not heard in appeal to plead that no notice was served upon him, and O. 6., R. 6, was applied.¹ Similarly, notices required to be given under the several Acts before institution of suits, need not be alleged in the pleadings, except, of course, where the law itself has provided to the contrary. For instance, the giving of a notice under Section 80, C. P. C., before commencing a suit against the Government or any government officer is a condition precedent, but it must be pleaded, as Section 80 lays down that the plaint shall contain a statement that such notice has been delivered, but it is not necessary that the word "delivered" should be used so long as the plaint indicates that the notice has been delivered, e.g., if it is stated that a notice under S. 80 has been given to Secretary to Govt. by registered post and that registration receipt acknowledgement due are put on the record.² Notice under Sec. 80 is necessary also in suits for injunction against the Govt.³ But a notice to the Railway Company under the Indian Railways Act need not be pleaded in the plaint, nor a notice under Section 10 of the Carriers Act.⁴ In writ by a firm or partners it is not necessary to allege that the firm is registered as required by Sec. 69 Partnership Act. It will be for the defendant to raise the plea that the suit was bad for non-compliance with that provision.⁵ The plaintiff sues in a representative character and the law requires certain steps to be taken by him to enable him to institute the suit, e.g., obtaining letters of administra-

¹ *Murlimanohar v. Raja Nand Singh*, 72 I. C. 1, 1924 (Pat.) 205.

² *Mohammad Faruq v. Governor-general*, 1949 Part. 93.

³ *State of Madras v. Chitturi Venkata*, 1957 A. P. 675; *Bagchand v. Secretary of State*, 1927 P. C. 176, *Shinghara Singh v. V. C. H. D. O.*, 1946 Lah. 247 (F. B.). *Contra. Arunchalam v. David*, 1927 Mad. 166.

⁴ *Le Ba Fin v. Tun On*, 1938 Rang. 437.

⁵ *Cheman Ram v. Ganga Saha* 1961 A. I. R. Orissa 94.

tion this is a condition precedent, but O. 7, R. 4, C. P. C. requires that this fact should be mentioned, in spite of the general rule to the contrary.

Where, however, a plaintiff is conscious that he has not performed a condition, and has good excuse for such non-performance he may, in his plaint, state the condition, the non-performance and the facts which afford him his excuse, e. g., that the defendant prevented or discouraged him from performing it.

This rule is not, strictly speaking, an exception to the general rule, as a "condition precedent" cannot be called a fact material for the cause of action of the plaintiff; it is only a condition superimposed on what otherwise would have been valid. Where, however, what appears to be a condition precedent is not really so but is really a part of the cause of action of the plaintiff for the suit the rule will not apply and the performance of such condition must be alleged as any other material fact constituting the cause of action for example, dishonour or notice of dishonour in a suit on a negotiable instrument, or the readiness and willingness of the plaintiff in a suit for specific performance or the service of a notice to quit in the case of a suit for ejectment of a tenant at will. In a suit for ejectment of a tenant on the ground of forfeiture under S. 111, T. P. Act, it is necessary to allege the giving of notice required by that Section not because it is a condition but because it is a part of the cause of action. Under S. 111, the tenancy determines only when the lessor gives notice in writing to determine the lease, it does not determine until such notice is given and the landlord has no cause of action for a suit for ejectment. The giving of notice is therefore part of the plaintiff's cause of action and must be alleged and a plaint not containing that averment should be held to disclose no cause of action for a suit for ejectment.

(ii) Neither party need, in any pleading, allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies on the other side, unless the

(ii) Matters of legal presumption

same has first been specifically denied. (O. 6, R. 13, C. P. C.).

For instance, a plaintiff in a suit on a promissory note or other negotiable instrument need not allege the consideration, as Section 118 of the Negotiable Instruments Act raises a presumption in his favour. It is sufficient to allege the execution of the promote by the defendant, unless, of course, consideration is made a substantive ground of claim in the alternative. It is not necessary to allege in the plaint that the defendant executed the bond in plaintiff's favour without fraud, intimidation or coercion and of his own free will, because the burden of proving any fact invalidating the bond is upon the defendant. But when a suit is brought on the bond of a *pardanashin* lady, it should be alleged in the plaint that the bond had been read out and explained to her, and she executed it of her own free will, after having independent advice, as it is for the plaintiff to prove these facts.¹

But if, say, in a suit for cancellation of a promissory note, the plaintiff alleges that it was without consideration, the defendant may plead that it was for consideration.

Presumptions referred to in this exception are those which a court is bound to make. In other words, only those facts need not be pleaded which a court "shall presume" within the meaning of the Indian Evidence Act; but facts which a court "may presume" should be pleaded.

(iii) Mat-
ters of
inducement

(iii) It is sometimes desirable to commence a plaint with some introductory allegations stating who the parties are, what business they carry on, how they are related or connected, and other surrounding circumstances leading up to the dispute. These are hot material facts, but they are allowed in England because they explain what follows. They are called "matters of inducement." On the analogy of English practice, they may be tolerated in India also, but a good pleader always reduces such prefatory statements to the minimum.

¹ Sajjad Ali Khan v. Wazir Ali Khan, 10 A. L. J. 364.

CHAPTER IV

Facts, not Evidence

The third fundamental rule of pleading is that every pleading must contain a statement of the material facts, but not the evidence by which they are to be proved.¹ The material facts on which a party relies are *Facta probanda* (i. e., the facts to be proved), and they should be stated in the pleadings. The evidence or the facts by means of which they are to be proved are *Facta probantia*, and they are not to be stated. They are not the facts in issue, but only relevant facts which will be proved at the trial in order to establish the facts in issue. In some cases the two kinds of facts are so mixed up as to be almost indistinguishable, e. g., in case of custom based on village administration paper (*wajib-ul-arz*) in the U. P., which is often the basis of the claim and its sole proof. In such cases the record has to be pleaded. So also, where the whole case is based on entries in account-books. But such cases are rare. Ordinarily, the distinction between the two kinds of facts is so clear and sharp as to be easily discernible and must be remembered when drawing up a pleading. It has been held that in the Punjab, *Wajib-ul-arz* or *Rewaj-i-Am* or Manual of Customary Law which record customs are only evidence of custom and it is not necessary to refer to them in the plaint but the plaintiff who alleges custom is entitled to rely on them ; therefore if he has referred to *Wajib-ul-arz* in his plaint, he cannot be precluded from relying on *Rewaj-i-Am*.²

Third
rule of
pleading

An excellent illustration of the principle just enunciated is contained in an action on a policy of life insurance.³ One

Instances

¹ O. 6, R. 2, C. P. C.

² *Jwala Singh v. Province of Punjab*, 1948 East Punjab 59.

³ *Broradale v. Hunter* 5 Mau. and Gr. 639.

of the terms of the policy was that it would become void if the policy holder "died by his own hand", and the defendant Insurance Company wanted to defend the claim on that ground. It was alleged in defence that the policy holder had, for weeks, been in a moody miserable state, that he had brought a pistol the day before his death, and that on him was found a letter to his wife stating that he intended to kill himself. It was held that all these facts were merely evidentiary facts and should not be alleged in the pleading, but it was sufficient to say that the assured "died by his own hand". If the facts of this case are thoroughly understood it would act as a guide in very many cases and tend to simplify and shorten pleadings. It can be said with confidence that there is hardly any pleader who, in similar set of circumstances, would not be tempted to set out a long history of the man's previous mental condition and of all his actions leading up to the commission of the fatal act. This case shows that all this would be unnecessary on the ground that they are *Facta probantia* and not *Facta probanda*. Another interesting illustration is of the case in which the defendant had pleaded all kinds of evidence to show that he was an earl, and had been received as an earl and had voted as an earl, etc., but there was no distinct allegation that the defendant *was* the Earl of Stirling. The result was that the whole plea was struck out.¹ When the main question to be raised in the pleading is that A had express authority to enter into a contract on behalf of the defendant, it may be pleaded that "the defendant had employed A as his agent to make the contract," or "that A was the *Mukhtar-aam* of the defendant having, under the *Mukhtar-nama*, full authority to make the contract on behalf of A", but it should not be alleged that "when A made the contract he represented that he was the defendant's agent," or that "A has all along been regarded by all the constituents of the defendant as having that authority." These averments need be made only when a case of implied authority is intended to be made out. In a suit for damage

¹ *Digby v. Alexander*, 8 Bing. 416, 430.

resulting from defendant's wrongful act, the facts establishing the connection between the alleged damage and the wrongful act should not be pleaded. It is sufficient to allege the wrongful act, that the defendant caused it, and that the plaintiff suffered damage thereby. In cases where time was not of the essence of a contract, it is sufficient to allege that the work was done "within a reasonable time in that behalf." It should not be alleged that the weather was bad, that the men had struck work or that there was any other reason why it took so long; that is the evidence by which it has to be proved that the time in fact occupied was reasonable.¹

The most common instance of pleading evidence in this country is that of setting up previous admissions of the opposite party. Admissions are certainly the best evidence of the facts admitted but they should find no place in a pleading.² Previous statements of the party pleading, corroborating the allegations about material facts, are also very often alleged in the pleadings. For instance, in a suit for damages for assault, it is often alleged that the plaintiff had made a report of the fact at the police station, or had filed a criminal complaint against the defendant the same day. In a suit on a lost bond, the fact that the plaintiff had made a report of the loss to the police at the time the loss had occurred, is also often wrongly alleged in the plaint. In a suit for recovery of the price of articles purchased by the defendant from time to time, or for recovery of the balance due from the defendant on account of money borrowed by him from time to time, what are necessary to be pleaded are the various transactions of the defendant. If the transactions are entered in a *Babikhata*, the entries need not be referred to in the pleadings. If, as often happens, balances have been struck and signed by the defendant, they are not to be pleaded, as they are mere admissions of the correctness of the previous items and therefore mere evidence, unless—(1) they are set up as acknow-

¹ *Eaton v Southley*, Willes 131.

² *Banumal v. Newandmal* A. I. R. 1921 Sind 159.

ledgments to save limitation, or (2) they were coupled with fresh promises to pay, and are themselves made the basis of the suit. In the latter case, the original items are not to be stated in the pleadings. Both should be stated only when the suit is based alternatively on the balance or account stated and the original contracts. Similarly, alleging the fact that notices had been exchanged between the parties, and in the plaintiff's notice he did not claim the amount now sued upon would be bad pleading on the part of a defendant.

It is most common for the defendant, in a suit for money lent, to plead that the plaintiff is himself indebted and is not in a position to lend money to others, or that the defendant is himself a well-to-do man and had no necessity to borrow money from others. All these are pieces of evidence and should never be pleaded.

The following rules enacted in the Code of Civil Procedure are no more than practical applications of the general rule that facts, and not evidence would be pleaded, and must be regarded only as its illustrations :—

(1) Whenever it is material to allege notice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred, for the circumstances would be no more than evidence of the fact.¹ In a suit for malicious prosecution, the plaintiff should only allege in the plaint that the defendant was actuated by malice in prosecuting him. He should not allege that he had previously given evidence against the defendant and the defendant had vowed to take revenge, though he can give evidence to prove these facts. In a suit against a defendant, on whose representation of A's solvency the plaintiff sold goods on credit to A, it is sufficient to allege that "the said representation was false, and was then known by the defendant to be so, and was made by him with intent to deceive and defraud the plaintiff."² No facts or circum-

¹ O. 6, R. 10, C. P. C.

² *Vide* C. P. C. Appendix A. Pleading No. 22.

Three
practical
applica-
tions of
the rule

Condition
of mind

tances from which the plaintiff has drawn this conclusion need be pleaded. But this does not mean that full particulars of the fraud should not be given. It will not be sufficient to say that the defendant committed a fraud.¹ Particulars as to the nature of the fraud and how it was committed, must be alleged, but not the evidence by which it is intended to be proved. In cases of fraud, undue influence and coercion full particulars must be set forth and there can be no departure from them in evidence.² The distinction between a condition of mind as fraudulent intention and fraud should be carefully understood. The former is a fact and can therefore be alleged as such. The latter is an inference from facts and cannot be alleged without the facts from which the inference is drawn.

In a case for damages for having been bitten by the defendant's dog, it is sufficient to plead that the defendant knew that the dog was of a ferocious and mischievous nature. It need not be alleged that, on a former occasion also, the dog had bitten another man in the defendant's presence, or that another man had warned the defendant of the nature of the animal, for all these facts would be mere evidence of knowledge.

(2) Whenever it is material to allege notice to any person Notice of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.³

There are many cases in which notice has to be alleged as a material fact, e. g., in a suit to recover trust property from a person to whom a trustee has given it in breach of the trust, or, in a suit where priority for subsequent transfer is claimed or where marshalling is set up, or, where a prior mortgagee claims to tack a subsequent advance in pursuance

¹ O. VI, R. 4, C. P. C.

² Bishundeo v. Sheogeni Rai, 1951 S. C. 280; Raja Srinivas v. S. D. O. Mirzapur, 1962 All. 590.

³ O. 6, R. 11.

of a contract in the mortgage-deed. In all such cases, it is enough to plead that the defendant had notice of the plaintiff's contract or of the trust, etc. The circumstances from which the notice is to be inferred need not be narrated, e. g., it need not be alleged that the defendant was an attesting witness to the plaintiff's deed, or that the plaintiff had himself told him of his contract, or that the defendant's son was present at the time of the contract and must have informed the defendant of it.

Sometimes the form is, or precise terms of the notice are, material and, in that case, the same should be alleged. For example, when the plaintiff claims to have determined a monthly tenancy by a 15 days' notice to quit, the pleading should be like this : "On November 13, 1952, the plaintiff served upon the defendant a written notice *calling upon him to vacate the house and deliver up possession to him on the expiry of November 30, 1952*".

(3) Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if, in such a case, the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.¹ The reason of the rule is that what is really material is the effect of the letters, etc., and the letters etc. are only the evidence of that effect. The most common example of implied contract is a carrier's contract to carry goods, which is implied from the fact that their clerk or agent accepts the goods and gives a receipt therefor. Similarly, a contract of tenancy may be implied from the acceptance of rent. A contract of indemnity may be implied where one who is only secondarily liable performs, under compulsion

Implied
contract

¹ O. 6, R. 12, C. P. C.

of law, an obligation for which another person is primarily liable. In all such cases, the conversation, conduct or circumstances, from which the contract is to be implied should be referred to in the pleading, with an allegation of the contract to be implied. But though the letters, conduct, etc., need not be set out in details, sufficient particulars should be given to specify the same. For instance, if payment of rent is referred to, it should be alleged when, by whom, and to whom was the payment made, and of what amount. If letters are referred to, their dates must be given. If conversation is referred to, it must be alleged between whom it took place, when and where. Thus, "there was a contract to pay commission at the rate of 12 annas per cent, interest at 8 annas and charity at 6 pies per cent, which is to be implied from the conversation which took place between the plaintiff and Mulraj, the *Mumim* of the defendant, at the plaintiff's shop on Baisakh Badi 2 when the transactions between the parties commenced." Or, "An agreement authorizing the plaintiff to sell the said grainpits on the defendant's failure to comply with the plaintiff's demand for more earnest money is to be implied from the correspondence which passed between the parties in the month of Baisakh, 1979". It must, however, be remembered that no amount of evidence can be looked into for a plea which was never put forward.¹

(4) Whenever a party wants to rely upon a plea of estoppel whether as an intentional inducement like the one under Sec. 115 of Indian Evidence Act or an unintentional inducement envisaged by Sec. 41 of T. P. Act or any other provision of procedural law or substantive law, facts relating to the same must be clearly stated. Otherwise the other party will not be precluded from contesting the claim and the courts may ultimately find the plea unsustainable. In an adoption case where facts relating to estoppel were not alleged in the plaint the Madras High Court did not allow such a plea to

¹ Siddik Mahomed Shah *v.* Mst. Saran, 1930 P. C. 57; Hemchand *v.* Pearey Lal, 1942 P. C. 64; Punit Rai *v.* Mohd. Majid, 1964 Pat. 348.

be raised at a later stage. It observed that the plaintiff must have set up such a plea specifically in the plaint making the necessary averments for sustaining such a plea.¹

¹ Sohanadri Rao in Re. A. I. R. 1933 M 42.

CHAPTER V

Form of Pleadings

The fourth rule of pleading is, that the material facts should be stated in the pleading “in a concise form”¹ but with precision and certainty.² The pleading shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures. Fourth rule of pleading

But it must be remembered that, while the pleadings should be concise, they should never be obscure. They should be both concise as well as precise.³ If the facts are lengthy they should certainly be given in all their particulars and prolixity alone will not justify the striking out of pleadings, if the facts stated are all material.⁴ The aim of the pleader should be to state all his material facts with precision, but as briefly as he can. A common form of bad pleading on the part of a defendant in a suit for recovery of debt is the following —

“The defendant does not know the plaintiff, he has never in his life been to the plaintiff’s house and has not borrowed the money from him.” The pleading is defective because it is neither concise nor precise. It should be something like this : “The defendant did not borrow the money alleged in the plaint or any money from the plaintiff”.

Each party should state his whole case with brevity. *Brevity* can be attained—(1) by omitting all unnecessary facts, (2) by omitting all unnecessary details when alleging material facts, and (3) by giving proper attention to the language used in alleging material facts. How to attain brevity

¹ O. 6, R. 2, C. P. C.

² O. 6, R. 4.

³ L. and L. Insurance Co. Ltd. v. Binoy Kumar, 1945 Cal. 218.

⁴ Davy v. Garrett, 7 Ch. D. 473; Heap v. Marris, 2 Q. B. D. 630.

We have already seen what are the unnecessary facts which should be omitted from a pleading. They are, matters of law, matters of evidence, matters not alleged in the opponent's pleading, matters presumed by law, the performance of conditions precedent, the words of documents, matters affecting costs only, and matters not material to the case. The defendant need not plead to the prayer of the plaintiff or to the damages claimed or their amount.

As to details, only unnecessary ones are to be omitted. Those that are necessary should in all cases be given. O. 6, R. 4, requires that necessary particulars should be given. This matter will be dealt with more fully in the next chapter.

The language used should be terse, and a mastery of the vocabulary and grammar of the language in which pleadings are drafted is essential.

How to
attain
precision

The other quality of good pleading, viz., *precision*, can be attained by remembering the following instructions:—

(a) Names of persons and places should be accurately given and correctly spelt; in any case, the spelling adopted at one place should be adhered to throughout.

(b) Avoid pronouns, such as "he", "she", "this", or "that" unless the antecedent is mentioned so close by that there can be no mistake as to the person or thing to whom the pronoun refers.

(c) As far as possible, do not refer to the plaintiff or defendant by their names only. Call them "the plaintiff" or "the said defendant", or if more than one, "the plaintiff No. 1," "the defendant No. 2," or "the plaintiff Ram Chandra" or "the defendant Ahmad Hasan," but, in whatever way you refer to a man at one place, refer to him in the same way throughout.

(d) Things should be called by their correct names and, in any event, the same thing should be described by the same name. It is bad pleading to call the same property "land with trees" at one place, "grove" at another, "trees with the land under them" at a third place in the same pleading; or

“document, dated the November 24, 1924” at one place, “*hiba nama*” at another, and “*dan patra*” at the third.

(e) If you are suing on a document, or on the basis of an Act, use the language of the document or the Act itself and do not invent your own language, however correct it may be. For instance, if a policy becomes void “if the assured shall die by his own hand”; do not plead that “the assured killed himself” or that “he committed suicide”; plead that “the assured died by his own hand.” If a mortgage-deed contains a covenant that “if the mortgagee is dispossessed by the mortgagor, the former will be entitled, etc.,” plead that “the mortgagee was dispossessed by the mortgagor” and not that “the mortgagor has wrongfully ejected the mortgagee.”

(f) Allege your facts boldly and plainly, without beating about the bush. “Ifs” and “buts” should be avoided as far as possible.

(g) Avoid the habit of describing facts in passive voice, omitting the nominative, e. g., the defendant’s money was paid up. Say instead, that “the plaintiff paid up the defendant’s money”.

(h) Avoid complex sentences, and instead of using one complex sentence, it is better to divide the matter into several simple sentences. The following is a bad form of pleading :—
“The defendant, as the son of A, is liable to the plaintiff in damages for breach of a contract to sell his house made by the said A in favour of the plaintiff by an agreement dated December 10, 1924.” Instead of this, say—

- “1. By an agreement dated December 10, 1924, A agreed to sell his house to the plaintiff.
2. A did not perform the said contract during his life-time.
3. A died on—, and the defendant is his son and representative.
4. The plaintiff called upon the defendant to perform the contract entered into by his father, but he refused to do so.

5. The plaintiff claims damages.

(i) Divide your pleadings into separate paragraphs, and state, as far as possible, only one fact in one paragraph.

(j) Avoid repetition.

(k) All necessary particulars should be embodied in the pleadings. This rule requires a long discussion and explanation, therefore the whole of the next chapter has been devoted to it, and it should be read as a supplement to this chapter.

Forms

In order that there should be no error in pleadings the Legislature has prescribed a few forms of pleadings which are to be found in Appendix A of the Code, and it is required that, when applicable, these forms, and when they are not applicable, forms of like character, as nearly as may be, shall be used for all pleadings.¹ It is, however, unfortunate that these forms are not all strictly correct and many of them offend against the fundamental rules of pleading, e. g., in form No. 25 particulars of the right of way are not set out; in form No. 33, general relief is unnecessarily claimed; in form No. 30, particulars of negligence are not given. It is for this reason that the Calcutta High Court has held that they are to be taken only as the standard of requisite brevity and as specimen of the character of pleadings required but are not to be adhered to slavishly.²

Signature

The law further requires that every pleading shall be signed by the party and his pleader (if any).³ The object of this rule is to prevent disputes as to whether the suit was instituted with, or without, the plaintiff's knowledge and authority.⁴ If there are several plaintiffs, the plaint should be signed by every one of them, though it cannot be said that a person cannot be treated as a plaintiff *until* he has signed the plaint.⁵ It is sufficient if one of the plaintiffs signs

¹ O. 6, R. 3, C. P. C.

² Ram Prasad *v.* Hazarimall, 134 I. C. 538, 58 C. 418, 1931 Cal. 458.

³ Basdeo *v.* Smidt, 22 A. 55 (61).

⁴ Sec. 3 (52), Act, X of 1897, Secretary of State *v.* Dinshaw A. I. R. 1925-5275.

⁵ O. 6, R. 14, C. P. C.

the plaint with knowledge and authority of other plaintiff.¹ Under the General Clauses Act, "sign" includes "mark" also, in case of a person who is unable to sign; and the thumb mark or pen mark of a person not able to sign his name is therefore as valid as a signature.² The Code of Civil Procedure further provides that the word "signed" also includes stamped.³ It is not, however, necessary for a person affixing his name stamp to a pleading that he should be unable to write his name.⁴ But mere initials of a person who can write his name would not be sufficient. It should also be noted that a pleading should be in existence before it is signed, and therefore, signing a blank sheet of paper before the pleading is drawn up is not sufficient, and the pleading written out subsequently upon such sheet of paper would be defective.⁵

The rule which requires a party to sign a pleading has a proviso to the effect that where the party is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same, or to sue or defend on his behalf. Proviso to the general rule

It is only when the party is unable to sign the pleading, that his agent can do so. Mere absence is not sufficient; the absence should be of such a kind as makes signature impossible. The words "other good cause" are of wide significance and leave the matter in the discretion of the court.⁶ The court should be satisfied, by affidavit or otherwise, that there is a sufficient reason for dispensing with the signature of the party, and that the person who proposes to sign the pleading on his behalf is an authorised person. A formal application should generally be made in such cases and a formal order should be recorded by the court, but no

¹ Bibi Asghari *v.* M. Kasim, 1951 Pat. 323; Sirju *v.* Badri, 1939 Nag. 242.

² Mohani *v.* Bungsi, 17 C. 580.

³ Sec. 2 (20) C. P. C.

⁴ Maharaja of Banaras *v.* Debi Dayal, 3 A. 575.

⁵ Girdhari *v.* Kanhaya, 15 A. 59.

⁶ Chandra *v.* Ganpat, 4 N. L. R. 117.

notice of any such application is necessary to be served on the other party.¹ Though such a formal application is nowhere mentioned in the Code, yet it becomes necessary in order to explain the reason for the party not signing himself and to obtain a finding from the court that the reason is sufficient. This can also be stated in the pleading in a separate para or in a note at the end.² It is not necessary that the person authorized should be authorized specifically to sign the pleading. A general authority to sue or defend on behalf of the party is sufficient.³ But a pleader cannot sign on behalf of the party.⁴ Where, however, the Manager of a bank gave power of attorney to one of the Directors, who was also a pleader, to institute a suit, a plaint signed and verified by the pleader was held to be regular.⁵

The way in which authority is obtained is immaterial, so long as the authority is there, e. g., if a power of attorney is obtained from a prisoner in jail in contravention of jail regulations, i. e., not through the Superintendent of jail, the authority is not invalid.⁶ It has been held that an agent, authorized to enter appearance can sign an amended plaint, if the suit was instituted with the plaintiff's approval.⁷ Even authority given after the institution of a suit to a servant who had signed the plaint originally without a formal authority was held to be sufficient.⁸ The Nagpur High Court has in a case taken a very lenient view and held that where a suit was duly authorized by a person the question whether his signature was made by him or by somebody on his behalf becomes immaterial.⁹ The Allahabad High Court has also observed in a recent case that the court should not make a technical fetish of rule 14 but apply it according to reason

¹ Puddomonee *v.* Sharma Charan, 1 Ind. Jur. N. S. 226.

² Madan Lal *v.* Union of India A. I. R. 1955 Bhopal 18.

³ Kastalino *v.* Rustamji, 4 B. 468.

⁴ Leakat *v.* Biseswar, 16 C. L. J. 578, 16 I. C. 255.

⁵ Narthu Ram *v.* The Lyalpur Bank, 69 I. C. 422 (Lah).

⁶ Bisheswar Nath *v.* Emperor, 16 A. L. J. 64, 44 I. C. 28, 40 A. 147.

⁷ Palaniappa *v.* Firm, V Bur. L. T. 199. 25 I. C. 136.

⁸ W. Johnston *v.* Sir Rameshwar Singh, 104 I. C. 747. (Pat).

⁹ Sarju Prasad *v.* Badri Prasad, 1939 (Nag.) 242.

and common sense.¹ Court can allow properly authorised person to sign plaint after holding that it was signed by a person lacking proper authority.²

In addition to being signed, a pleading has also to be verified by the party, or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.³ The object of verification is to fix responsibility for the statements made.⁴

Verifica-
tion

The distinction between the requirements of signature and verification should be noted. While the pleading should be signed only by the party (or all the parties) or, in special cases only, by his authorized agent, a verification may be made by any one person, either the party, or any one of the parties, or *any* other person acquainted with the facts. The laxity in the latter case is due to the fact that, while signatures are necessary to show that the pleading has been filed with the knowledge and approval of the party, the object of verification is only to fix the responsibility of the statements made therein upon some one⁵, before the court proceeds to adjudicate upon them. As false verification is an offence punishable under the Indian Penal Code, the responsibility of verification is very great and should always be realized.

In the case of verification, it is not necessary that there should be some good cause before a party can be relieved of the duty of verifying his pleading, or that the person verifying is authorized to do so. All that is necessary is, that if any other person does that work, he should satisfy the court, by affidavit or otherwise, that he is acquainted with the facts of the case. It is not necessary to make a formal application for permission to make the verification. Affi-

¹ Sharma B. R. *v.* Nanak Chand A. I. R. 1967 All. 487.

² Mohd. Islam *v.* Delhi Wage Board, Delhi. I. L. R. (1966) 1 Punj. 324.

³ O. 6, R. 15.

⁴ Devi *v.* Chairman Election Tribunal, 1956 All. 19; J. B. Ross *v.* C. R. S. 1917 Cal. 269.

⁵ Basdeo *v.* Smidt, 22 A. 55; Ross *v.* Seriven, 43 C. 1001.

davits will not generally be required in cases where the persons verifying are persons in charge of the business to which the pleading relates or are recognized agents of the parties.¹ If, however, the rules of any High Court require that the fitness of the person verifying should be proved by affidavit, such affidavit becomes indispensable, and it has been held that the rule is mandatory and gives no discretion to the Judge to make exceptions.² But no one (except a party) should be allowed to verify a pleading unless he is able to verify the main allegations on personal knowledge, for, otherwise, he cannot strictly be said to be acquainted with the facts. Cases are not uncommon where *Mukhtarams* verify the complaints on information received from their subordinate *Karindas*. In such cases, the latter who really are the persons acquainted with the facts of the case, should come forward to verify the complaints. It is true that "acquainted" is a wide word and may also mean "acquainted on the authority of information received from others,"³ but, having the proper object of verification in view, courts will do well if, in case the man verifying is not able to verify the main allegations on his personal knowledge, they refuse to regard such a man as one acquainted with the facts of the case. Of course, about minor facts or matters of detail, the verification may be on information received.

But a court has always general power to require the party himself to verify his pleading,⁴ and this power should always be exercised when the statements made are of a scandalous nature,⁵ or where a party alleges gross fraud based on facts known to him.⁶

The verification is not required to be made in the pre-

¹ *Kastalino v. Rustomji*, 4 B. 468.

² *Manindra Chandra v. Velji Mulji*, 105 I. C. 564, 31 C. W. N. 1031, 1927 (Cal.) 773.

³ *Port Canning Co. v. Dharnidhar*, 9 C. W. N. 608.

⁴ *Raja of Tomkuhi v. Braidwood*, 9 A. 505.

⁵ *Barjeshwar v. Budhanuddi*, 6 C. 268.

⁶ *Jardine Skinner v. Maharani Surnomyee*, 24 W. R. 215; *Pratap Chandra v. Kristo*, 8 C. 885.

sence of the court, but it has been held in Bombay that it is desirable that verification by persons other than parties should be made before the court, unless there are sufficient reasons for dispensing with the attendance of the person verifying.¹

The above rules about the person who should sign and verify a pleading are subject to this modification that in cases where a corporation is a party, a pleading may be signed and verified, on behalf of the corporation, by the Secretary or by any Director or other principal officer of the Corporation who is able to depose to the facts of the case.² This rule is, however, only permissive and not mandatory so as to exclude the application of the general rule in O. 6, R. 14, C. P. C. which applies to companies as well as to individuals. A company can therefore authorize some other person to sign on its behalf.³ But signature of an attorney of the Secretary or Director would not be sufficient.⁴ The person verifying a pleading on behalf of corporation must prove by affidavit his fitness to verify even though upon information or belief.⁵ But there is nothing in the code which makes it obligatory to state in the body of the plaint or by affidavit that the person signing or verifying is an officer able to depose to the facts of the case.⁶ Even the Calcutta High Court has held that where a plaint is signed and verified by the Secretary who was empowered by the Articles of Association to do so and an averment to that effect was made in the plaint, no separate affidavit was necessary.⁷

Pleading by corporation by whom signed and verified

¹ *Kastolino v. Rustomji*, 4 B. 468.

² O. 29, R. 1.

³ *Bundi Portland Cement Co. v. Abdul Husain*, 1936 (Bom.) 418; *Calico Printers Assn. v. A. A. Karim*, 128 I. C. 557, 32 Bom. L. R. 1305, 1930 (Bom.) 566.

⁴ *Osborne Garrett & Co. v. Raisi*, 100 I. C. 450 (Sind); *Delhi and London Bank v. Oldham*, 21 C. 60.

⁵ *International C. C. Co. v. Mehta & Co.*, 105 I. C. 568, 31 C. W. N. 1030, 1927 (Cal.) 786; *Port Canning Co. v. Dharnidhar*, 9 C. W. N. 608.

⁶ *Bundi Portland Cement Co. v. Abdul Husain*, 1936 (Bom.) 418.

⁷ *Gopalganj L. Bhandar Ltd. v. Purna Chandra*, 40 C. W. N. 930.

This rule does not apply to unregistered companies, as they can sue only in the names of their members, but it does apply to foreign Corporations¹.

Mode of
verification

The proper mode of verification is, that the person verifying shall specify, at the foot of the pleading, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge, and what he verifies upon information received and believed to be true. The verification shall be signed by the person making it and shall state the date on which, and the place at which, it was signed.²

A Verification in the following words was held to be bad; "To the extent of my knowledge, the purport of this is true,"³ "contents of paras 1-11 above are true to the best of my knowledge and instructions".⁴ A verification to the effect that the contents are substantially true is not sufficient.⁵ The names of the person from whom information is received may or may not be disclosed.⁶

Defects of
signature
or verification

Want of signature or verification, or any defect in either will not make the pleading void, and a suit cannot be dismissed nor can a defence be struck out simply for want of, or a defect in, the signature or verification of the plaint or written statement,⁷ as these are matters of procedure only.⁸ It has been treated to be a mere irregularity and curable by

¹ *Singer Manufacturing Co. v. Yar Mohd.*, (1921) P. R. No. 8, p. 83; *Singer Manufacturing Co. v. Baij Nath*, 30 C. 103.

² Or. 6, R. 15.

³ *Girdhari v. Kanhaya Lal*, 15 A. 59.

⁴ *Mt. Sobhag Kunwar v. Jugraj*, 1949 Ajmer 37.

⁵ *Waggoner v. Brown*, 8 How Pr. 212.

⁶ *Rivers Steam Navigation Co. v. Khaita*, 38 C. W. N. 551, 34 C. 632, 53 C. L. J. 391.

⁷ *Arunachellum v. Prahaya* 1912 M. W. N. 1207; *Basdeo v. Smidt*, 22 A 55; *Nandlal v. Sankru*, 165 P. W. R. 1911; *Rajit v. Katesar*, 18 A 396; *Rustom v. Tara*, 11 C. W. N. 871; *Fateh Chand v. Mansab*, 20 A. 442; *Mt. Sobhag Kunwar v. Jugraj*, 1949 Ajmer 37; *All India Reporter v. Ramchandra*, 1961 Bom. 292.

⁸ *E. A. Zippel v. K. D. Kapur*, 1932 Sind 9, 139 I. C. 114; *Wali Md. v. Ishakali*, 1931 A. L. J. 772, 1931 All. 507, 134 I. C. 26.

amendment¹. The defect may be cured by amendment, at any stage of the suit,² and when it is cured by amendment, the plaint must be taken to have been presented on the date on which it was originally presented, and not on the date on which it was amended.³ If the defect is discovered in appeal, the Appellate Court may, if it thinks fit, have the defect removed, but where the defect is such that it does not affect the merits of the case, no notice of it need be taken.⁴

When an objection to such defect is taken, the court should not frame an issue on the point, but should get the defect at once removed. Where, however, it is shown that the suit was not filed with the knowledge of the so-called plaintiff, it should be dismissed and the mere fact that a pleader having general power of attorney to sign plaints for him has signed the plaint will not make it a valid document.⁵

¹ *Gauri Kumari v. Commissioner I. Tax.* A. I. R. 1960 Pat. 270; *Nand Kishore v. Bhagi Kuer* A. I. R. 1958 A. 329, *Purusho Hamidwllah bhai & Co. v. Manilal & sons* A. I. R. 1961 S. C. 325.

² *Basdeo v. Smidt*, 22 A. 55; *Nandlal v. Sarkoni*, 165 P. W. R. 1911; *W. Johnston v. Sir Rameshwar Singh*, 104 I. C. 747 (Pat); *Shibdeo v. Ram Prasad*, 46 A. 637, 22 A. L. J. 690; *Subbiah v. Sankarapandious*, 1948 Mad. 369, 1948 M. W. N. 190, 1948 M. L. J. 227; *Dinbandhu v. Jadumoni*, 1954 S. C. 411.

³ *Ram Gopal v. Dhirendra*, 101 I. C. 573, 31 C. W. N. 397.
But See *Kehar Singh v. Mahant Autar Singh* 69 Punj. L. R. 238.

⁴ Sec. 99, C. P. C. Also See *Sharma B. R. v. Nawab Chand* A. 1 R. 1967 All. p. 487.

⁵ *Mahabir v. Shah Wahid Alam*, 11 A. W. N. 152.

CHAPTER VI

Particulars

Particulars
and their
importance

In every pleading a certain amount of detail is necessary to ensure clearness and to prevent the other party from being taken by surprise. The term "Particulars" has not been defined in any enactment. As observed in the election case of Hari Das "shortly stated, 'Particulars' may be described as the details of the case set up by the party,"¹ No precise rule about the degree of particularity required in any case can be laid down, but as much certainty and particularity should be insisted on as is reasonable; and a party is entitled to a fair outline of the case of his opponent, and to have any and every particular that will enable him to know his opponent's case and to prepare himself accordingly,² though he is not entitled to a disclosure of the evidence of his opponent.³ It would, however, be no excuse for withholding particulars that they will also disclose some portion of the evidence.⁴ For instance, in a suit for infringement of a trade mark on the allegation that the use of the trade mark by the defendant had in fact induced "diverse persons" to purchase defendant's goods as the plaintiff's goods, the plaintiff is bound to disclose the names of such persons.⁵ The object of giving particulars is to narrow down issues, by limiting the inquiry at the trial to matters set out in them, and a party is not entitled to go into any matters not included in his particulars.⁶ It is, therefore, the duty of every pleader to

¹ Hari Das *v.* Hira Lal 4 E. L. R. 466.

² Thorp *v.* Holdsworth, 3 Ch. D. 637; Philipps *v.* Philipps, 4 Q. B. D. 117; Saunders *v.* Jones, 7 Ch. D. 452; Gauri Shankar *v.* Manki Kunwar 21 A. L. J. 571, 45 A. 624, 74 I. C. 466, 1924 (All.) 17.

³ Creet *v.* Gangaraj, 17 I. C. 214, 1937 (Cal.) 129.

⁴ Marriott *v.* Chamberlaine, 17 Q. B. D. 154; Zierenberg *v.* Labouchere, 2 Q. B. 183; Bishop *v.* Bishop, (1901) p. 325, 70 L. J. p. 93.

⁵ Humphries *v.* The Taylor Drug Co., 37 Ch. D. 693.

⁶ Wooly *v.* Broad, 2 Q. B. 317.

apply for further particulars of the pleading of his opponent, where no particulars are given or they are not given in sufficient detail, even though he can make a shrewd guess as to what is really meant, because he will thereby be able not only to prepare himself with his defence, but also to pin down his adversary to a definite case.¹ He is entitled to do this under O. 6, R. 5, C. P. C. If particulars are not given, and neither the opposite party applies for them nor does the court insist on their being set out in the pleading, the party pleading would be entitled to give evidence of all and any facts which support his allegation.² It is, therefore, also the duty of the court to insist that full particulars should be given in the pleading and the High Courts in India as well as the Privy Council have, from time to time, drawn the attention of courts to the importance of this matter. The judgment of the Privy Council in the case of *Bal Gangadhar Tilak*³ and that of the Allahabad High Court in the case of *Gauri Shanker*⁴ deserve to be specially read in this connection. As remarked by His Lordship the Chief Justice in the Allahabad case, "Subordinate Judges should be watchful to see that in all cases the parties plead their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application." In a case in which only general allegations of immorality were made without giving sufficient particulars, the High Court held that it was the duty of the Judge to have the whole general paragraph struck out.⁵ But neither the right of the defendant nor the duty of the court to call for particulars, if necessary, can be any excuse for a plaintiff not giving full particulars in his plaint. In a suit for a public right when the plaintiff had not given

¹ *Nathu Ram v. Kalu*, 171 I. C. 121 (Nag.)

² *Hewson v. Cleeve*, 2 Ir. T. 536.

³ *Bal Gangadhar Tilak v. Sri Srinivas Pandit* 39 B. 441, 22 C. L. J. 1, 19 C. W. N. 729, 13 A. L. J. 570, 29 M. L. J. 34.

⁴ *Gauri Shankar v. Manki Kunwar*, 21 A. L. J. 571, 45 A. 624, 74 I. C. 466.

⁵ *Jagdish v. Hazarilal*, 140 I. C. 585, 1932 A. L. J. 671.

details of the special damage suffered, the Calcutta High Court refused to listen to the argument that the defendant could have got the information if he had applied for particulars.¹ See also *Sita Ram v. Hari Ram*.²

As to when particulars should be ordered and when refused *see* Chapter VIII.

How far it is necessary to set out details of time, place, account, etc., in the pleading, is a matter which a pleader should carefully consider. Experience and common sense, more than any hard and fast rules of law, can best teach him this.

In the Code of Civil Procedure, it is laid down that particulars must be stated when fraud, breach of trust, wilful default or undue influence is pleaded. In other cases, when more particulars than are exemplified in the Forms in Appendix A are necessary, they are to be stated.³

In a case for ferry lease for three years a notice of cancellation of lease of falls of public ferry, as required by Sec. 10 of Northern India Ferries Act. (1878) was given, but the notice given by Executive Engineer did not express the intention of Government to cancel the lease, though a mention was made of Sec. 10 aforesaid. This notice was Found to be incompetent as it did not comply with the provisions of law. The defendant challenged the validity of the notice, without mentioning the ground. The S. C. observed that when validity of notice was challenged it was not necessary to mention all the grounds. It may be noted that the Government lost for want of particulars in the notice while the defendants objection to notice was held to imply all the grounds on which notice could be challenged.⁴

It must be clearly understood that under 'particulars' only such facts as are the details of the facts stated in the pleading can be set out, and no new material altogether

¹ *Raj Chandra v. Mahim Chandra*, 1926 (Cal.) 549, 91 I. C. 728.

² *Sitaram v. Hari Ram*, 165 I. C. 24, 40 C. W. N. 913.

³ O. 6, R. 4, C. P. C.

⁴ *State of M. P. v. Satya Narain Pd.* A. I. R. 1970 S. C. 1189.

based on an entirely different cause of action can be introduced, as that would not be permissible under O. 6, R. 7, C. P. C.¹ The distinction between particulars of a material fact and material fact itself is a fine one but is very important and should not be lost sight of. "Material Fact" is an essential element of the cause of action and if any material fact is omitted, the plaint is bad and can be rejected under Order 6, Rule 11 (a), C. P. C. Particulars are the details of a material fact which it is necessary for the other party to know to prevent him from being taken by surprise and to narrow the issues. An omission to give such particulars does not necessarily entail rejection of the plaint but the court may make an order for submission of necessary particulars. But there are certain particulars without which an allegation of material fact does not amount to a good averment of that fact at all e. g., an allegation of fraud. The omission of necessary particulars will make the averment of a material fact like fraud bad and liable to be struck out altogether. These particulars are different from those required to narrow the issues or prevent surprise, absence of which does not entail rejection of the pleading but gives the other party a right to ask the court to order particulars.

The rule relating to particulars has assumed greater importance in election cases. Sec. 123 of R. P. Act describes the corrupt practices and under the law particulars of alleged corrupt practices have to be given in the election petition. The S. C while discussing the question of importance of particulars observed :-

"There can be no reasonable doubt that the requirement of full particulars is one that has to be complied with, with sufficient fullness and clarification so as to enable the opposite party fairly to meet them and they must be such as not to turn the inquiry before the tribunal into a rambling and roving inquisition."²

¹ Mehnga v. Maya Singh, 1937 (Lah.) 795.

² A Bhikaji Keshao Joshi v. Brijlal Nand Lal Biyani 10 E. L. R. 357 (S. C.)

Certainty
as to time

Dates where necessary, should always be given, e. g., date of notice, date of rent or debt falling due,¹ date of default or breach where the cause of action is based on it, date of execution of a bond or promissory note,² date of sale of each consignment of goods in a suit for price of goods supplied.³

Places

Places should be definitely mentioned, so that they can be properly identified. Particulars of the property about which a claim is made should be clearly specified, so that there may be no mistake about its identity and no difficulty may be experienced at the time of the execution of the decree. If it is a house, it should be described by its number, name of the street, or by the boundaries or by number in the *khasra* or other village record. If it is a *zamindari* property or an agricultural field, full specification of it as given in the village records (e. g., number of *khewat*, *khatauni* or *khasra*, name of *mahal*, etc.) should be given.⁴ The addition made by Calcutta High Court to Rule 3 of Order 7 requires that when area of property is mentioned the area according to the notations used in the record of settlement or survey should be stated, with or without, at the option of the party, the same in terms of the local measures.

Account

In a suit for money, particulars of the account by which the amount claimed has been arrived at, should be given.⁵ For instance, if the suit is for the total of several items advanced at different times, each item with the date and amount should be specified.⁶ If a principal sum is claimed with a further sum as interest, full account of the calculation of interest should be given. If payments by defendant are credited the plaintiff must not merely name a lump sum, but must state the dates and items of the

¹ *Beaufort v. Ledwith*, 2 Ir. R. 16.

² *Walker v. Hicks*, 3 Q. B. D. 8.

³ *Parpaite Freres v. Dickinson*, 26 W. R. 479.

⁴ O. 7, R. 3, C. P. C.

⁵ *Philipps v. Philipps*, 4 Q. B. D. 127.

⁶ *Gunn v. Tucker*, 7 Times L. R. 280.

amounts credited.¹ A mortgagee in possession admitting receipt of certain sums on account must give particulars of all sums received.² But if a general account is claimed and the court sees that such an account must be taken, then no such particulars need be given.³

Particularity is most needed where misconduct is imputed to the other party, e. g., fraud, breach of trust, wilful default, negligence, or undue influence. It is no excuse for the omission of details that the opponent must himself be aware of the facts. Your opponent is entitled to know the outlines of your case and to bind you to a definite story so that he may be able to meet it. In a recent case their Lordships of the Privy Council have enjoined all judges to compel a litigant who pleads fraud or such other misconduct of the other party to place on record precise and specific details of these charges, and have observed that cases of such type would be much simplified if this practice is strictly observed and insisted upon by courts, even if no objection is taken by the opposite party.⁴ Or. VI Rule 4, C. P. C. requires that particulars of the six items given therein should be specified each item constitutes a separate category in law, though some of them are of allied nature. It is possible that some of them may overlap each other in some cases. But according to S. C. case of *Bishun Dev Narain*, each of them has to be separately pleaded.⁵ This will bring about precision in pleading, prevent surprise to the other party and ensure a fair trial.

Fraud should be pleaded with the greatest possible care and a party pleading it must fully realise his responsibility for doing so. In England counsel refuse to plead fraud without having full and definite instructions in writing from their

¹ *Godden v. Corsten*, 5 C. P. D. 17.

² *Kemp v. Goldberg*, 36 Ch. D. 505.

³ *Cart v. Anderson*, 18 Times L. R. 206; *Blackie v. Osmaston*, 28 Ch. D. 119; *Augustinus v. Nerinck*, 16 Ch. D. 13.

⁴ *Bharat Dharm Syndicate Ltd. v. Harish Chandra*, 41 C. W. N. 746, 168 I. C. 620, 1937 (P. C.) 146, 1937 A. W. R. 832.

⁵ *Bishnu Dev Narain v. Seogeni Rai* A. I. R. 1951 S. C. 280.

clients, and even then they always warn their clients before hand of the immense risk the latter run by pleading such a grave charge. A charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind.¹ The warning is usually entered in a marginal note to the pleading. In this country, fraud and other allied charges are very lightly pleaded. The words "fraudulently," "dishonestly," "wrongfully," "cunningly," etc., are frequently used to qualify the acts and conduct of the opposite party, without fully realizing the exact and legal meaning of those words. A pleader must insist on full particulars and details of the alleged fraud being given, and should never plead that charge unless a clear case of fraud is made out from the facts supplied to him. Mere suspicion is not enough, there should be circumstances incompatible with honest dealing.²

Where fraud etc. are alleged as a matter of an objective fact, O. 6, R. 4, C. P. C. applies and particulars must be given. But where a mental condition is alleged, such as fraudulent intention etc. O. 6, R. 10 will apply and no particulars need be given. Thus the question of bonafides or malafides is one of mental condition and is covered by O. 6, R. 10.³

Before drafting a plea of fraud, the definition of that word in the Contract Act (Sec. 17) should be carefully read and it should be seen whether the facts to be alleged fall within that definition. If they do, and if it is decided to plead fraud, it should not be pleaded generally, for there is a well-known rule of pleading expressed in the frequently quoted language of Lord Selbourne⁴ that "with regard to fraud, if there is any principle which is perfectly well settled, it is that general allegations, however strong the words in which they are

¹ *Le Lievre v. Gould*, [1893] 1 Q. B. 491 at p. 498.

² *Hansraj v. Dehra Dun Mussoorie Elec. Tram Co.*, 1940 (P. C.) 98, 187 I. C. 787; *Rakhal Chandra v. Prasad Chandra*, 1926 (Cal.) 73, 90 I. C. 2263.

³ *Dinbai Dinshaw Petit v. Dominion of India*, 1951 Bom. 72.

⁴ *Wallingford v. Mutual Society*, 5 App. Cas. 685.

stated, are insufficient even to amount to an averment of fraud of which any court can take notice.”¹ Specific allegations, with full particulars as to what the fraud was, how, by whom, and when was it committed, should be given,² and if such details are not given in the plaint in a case founded solely on fraud, it is liable to be rejected.³

The proper way of pleading fraud is to set out all the acts and representations alleged to be fraudulent in their full details and then to state that those acts were done with a mala fide intention of committing fraud. It should be mentioned whether the representations were oral or in writing. If oral, the substance of such representations should be given alleging the date and place when and where they were made, and the name of the person making them, and that of the person to whom they were made. If they were in writing, the document or documents containing them should be clearly identified in the particulars.⁴

For instance, in a suit for declaration of title to certain property entered in the record of rights as that of the plaintiff's guardian, the bare allegation that the entry was brought about by the guardian fraudulently was not held sufficient to raise a question of fraud, and it was pointed out that it must be

¹ *Raj Narain v. Majlis Sahay*, 104 I. C. 821 (Pat.); *v. Pd. Firm v. E. K. Chittyor*, 146 I. C. 954, 1933 Rang. 169; *C. D. Lincoln v. Sheikh Noor Elahi*, 1943 (Oudh) 192; *Bishundeo v. Sheogeni*, 1951 S. C. 280; *Bharat Dharma Syndicate v. Harish Chandra*, 64 I. A. 143 (147); *Union of India v. Pandurang Kashinath More*, 1962 S. C. 630; *Raja Srinivas v. S. D. O. Mirzapur*, 1962 All. 590. *Kasturi Laxmileayamma v. Sabvitres Venkoba Rao* A. I. R. 1970 A. P. 440.

² *Annada v. Atul* 23 C. W. N. 1045, 54 I. C. 197, 31 C. L. J. 73; *D. Weston v. Peary Mohum Das*, 40 C. 898, 23 I. C. 25, 18 C. W. N. 185; *Rajkumar v. Gobind*, 14 I. C. 53, 17 C. W. N. 524; *Lachmi Narayan v. Kishan Kishore*, 38 A. 126, 14 A. L. J. 25, 33 I. C. 913; *Ghaman v. Kanhiya*, 15 P. W. R. 1915, 26 I. C. 426, 121 P. L. R. 1915; *Punjab Commercial Syndicate v. Punjab Co-operative Bank*, 1926 (Lahore) 96, 6 Lah. 512, 92 I. C. 322; *Lloyds Bank v. J. E. Guzder*, 56 C. 868; *Rattanasabapathy v. Ammakannammal*, 57 M. L. J. 609; *Maung Hla v. M. N. S. Chattyor*, 145 I. C. 118, 1933 Rang. 153; *Mate Nande v. Dal. Chand*, 1948 Nag. 170; *Union of India v. Motilal*, 1962 Pat. 384.

³ *Ganga Ram v. Tiluckram*, 15 C. 533 (P. C.).

⁴ *Gauri Shankar v. Manki*, 21 A. L. J. 571, 45 A. 624.

alleged who committed the fraud, that what was done by the guardian was done with fraudulent intention of defeating the plaintiff's rights, and that the Settlement Officer was misled by her act and was induced thereby to make an incorrect entry in the record.¹ So, when the defendant is charged with making false entries in the account-books the entries charged to be false, and the nature of the plaintiff's objection to each of them should be specified.²

Unless fraud is thus clearly and specifically alleged it cannot be put in issue,³ and it will not be considered enough that there are allegations in the pleading from which such a plea can be spun out.⁴ But in a case in Oudh the Chief Court held that where the transactions spoke for themselves and furnished internal evidence of a well thought out design the plaintiff's omission to set forth the particulars and details of the conspiracy did not matter.⁵ In a recent case Calcutta High Court held that the evidence sufficiently disclosed fraud and collusion on the part of the limited owner and the absence and particulars could not be regarded as insufficient. It was observed that evidence for proving fraud need not be very specific.⁶ This decision, however, makes no departure from the established principle. It is based upon the peculiar facts of the case (see a similar case from Nagpur under "undue influence"). In a suit for possession of property purchased at an auction sale the only fraud defendant pleaded was that there was collusion between the decree-

¹ *Hare Kishna v. Umesh*, 2 Pat. L. T. 528, 62 I. C. 373, 1921 (Pat.) 209, 6 P. L. J. 373 C. F. B.)

² *Newport Dry Dock Co. v. Paynter*, 34 Ch. D. 88.

³ *Khirode v. Janki*, 20 I. C. 753; *Manak Chand v. Girdhari*, 46 I. C. 342; *Narain Singh v. Sri Ram*, 108, I. C. 383. (Cal.) *Namdev Digamber v. Vijay Kumar Ram Chandra*, A. I. R. 1963 Bom. 244; *Julum Dhari Rai v. Debi Rai* A. I. R. 1965 Pat. 279.

⁴ *Sankuni v. Nallappah*, 29 I. C. 482 (Mad.)

⁵ *Gajendra Shah v. Shankar Baksh*, 1352 I. C. 468; *Nanhoo Beg v. Gulam Husain*, I. I. R. (1950) Nag. 50; *Subbamma v. Mohd. Abdul Hafiz*, 1950 Hyderabad 55; *Ramji Mawji v. Valji, Harji*, 1950 Kutch 67; *Bishun Deo Narain v. Seogini Rai*, 1951 S. C. 280.

⁶ *Puran Chandra Bando Padhyay v. Gauri Pad Muleho Padhyay* A. I. R. 1968 Cal. 512.

holder and the purchaser and that they had agreed to purchase the property at a low price but the Subordinate Judge sent for the record and framed an issue whether the purchaser had deliberately misrepresented the amount of a prior charge. The Bombay High Court held that the Subordinate Judge was not justified in raising this new case of fraud for the defendant.¹ An allegation of fraud should be made in the pleading and cannot be allowed to be made at a later stage of the suit,² unless the party pleading it was not aware of the fraud, in which case he can set it up when he becomes aware of it.³ Where, however, omission to refer to fraud in the plaint was due to mere oversight, the court allowed amendment of the plaint.⁴

The charges of fraud must be substantially proved as laid and when one kind of fraud is charged, another kind of fraud cannot, upon failure of its proof, be substituted for it,⁵ nor is it proper for an Appellate Court to entertain a case of fraud other than the one specifically alleged in the pleading.⁶

For example, when a lady suing for cancellation of a sale-deed executed by her, alleged that the defendants, who were her agents, got the deed executed by her without making her aware of the contents thereof, and that she did not get any independent legal advice and did not get any consideration, but proved that she had put her signature on blank sheets of paper, subsequently filled up without her knowledge and

¹ *Dodhasappa v. Pradhanappa*, 1926 (Bom.) 33, 91 I. C. 426, 22, Bom. L. R. 1318.

² *Govindaswami v. Ethirajammal* 34 I. C. 1 (1916) M. W. N. 180.

³ *Radha Kishan v. Wajib Ali Khan* 3 O. L. J. 501 36 I. C. 746, 19 O. C. 334.

⁴ *Munisami v. Raja Gopala* 1928 (Mad.) 759 and 118 I. C. 763, 54 M. L. J. 644.

⁵ *Abdul Hasan v. Turner* 11 B. 620 14 I. A. 111; *Ganga Ram v. Dwarka* 14 A. W. N. 6; *Nagendra v. Parbati* 35 I. C. 339 20 C. W. N. 819; *Bansi Ram v. Secretary of State* 35 I. C. 284 20 C. W. N. 638; *Satis v. Kalidasi*, 34 C. L. J. 529, 68 I. C. 577, 26 C. W. N. 177, 1922 (Cal). 202; *Mohd. Baksh v. Rawalpindi Club*, 1955 (Lah.) 222.

⁶ *Md. Mira v. Sarvasi*, 23 M. 227.

turned into a conveyance, it was held that she could not succeed.¹

The general rule that fraud must be specifically pleaded would not, however, apply when the party aggrieved raises no objection and fights out the case as though the pleadings were in proper form.²

Similarly, where there is an allegation of fraud, a specific allegation of undue influence based on the same facts is unnecessary.³

Undue
Influence

This being a species of fraud should be pleaded with precision and unless a case of undue influence is made out in the pleadings, it cannot be investigated by courts.⁴ It must be stated how the person alleged to have exercised undue influence was in a position to dominate the will of, and exercise his influence over, the party pleading, and that in fact he did

¹ *Bansi Ram v. Secretary of State*, 35 I. C. 284, 20 C. W. N. 638.

² *Beni Madho v. Basanto Kunbi*, 35 I. C. 252 (All.)

³ *Narayan Bhat v. Akkerbai*, 33 I. C. 576, 18 Bom. L. R. 27.

⁴ *Inder Chand v. Bidyadhar*, 60 I. C. 282, 1921 (Pat.) 107; *Ladli Prasad v. Karnal Distillery*, 1963 S. C. 1279.

influence the latter,¹ and thereby obtained an undue advantage. It is not sufficient merely to allege that the relations of the parties were such that one relied upon the other and the other was in a position to dominate the will of the first. It should further be alleged that such other person used his position to obtain an undue advantage.² In a case for setting aside a deed of gift on the ground of fraudulent representation, where the plaintiff in order to show that defendant could commit the fraud, alleged how he was in a position to exercise undue influence over the plaintiff, it was held by the Privy Council that no substantial case of undue influence was raised and the allegations in the plaint were only ancillary to the main charge of fraudulent misrepresentation.³ Detailed facts on which the plaintiff relies should be given and it is not sufficient merely to raise an atmosphere of suspicion.⁴

The plea of undue influence should be clearly stated in sufficient detail. The allegation that P lived with D and as managing his affairs is sufficient to infer that D was in a position to dominate the will of P.⁵ The Supreme Court has held that the Court must scrutinise the pleading to find out that a plea has been made out and full particulars given before examining any case of undue influence.⁶ As in the case of fraud, so in the case of undue influence, a party must be strictly confined to the statement of facts alleged by him as particulars and cannot make out another kind of undue influence.⁷ The Allahabad High Court gave effect to the pleas of misrepresentation and undue influence where the facts alleged constituted misrepresentation and undue influence though these words were not used in the plaint which only spoke

¹ Shiddubai v. Nilapagauda, 83 I. C. 616 (Bom.)

² Poosathurai v. Kamriappa, 55 I. C. 447, 43 M. 546, 18 A. L. J. 344, 22 Bom. L. R. 538 (P. C.); Sanwal Dass v. Kuremal, 10 Lah. L. J. 27, 1928 (Lah.) 224, 9 Lah. 470, 109 I. C. 779.

³ Someshwer v. Tirbhuwan, 1934 (P. C.) 130, 149 I. C. 480.

⁴ Chandravathi v. Janti Prasad, 40 P. L. R. 146, 1938 (Lah.) 333.

⁵ Telangana Narayana Bholta v. Naiasimha A. I. R. 1965 Ker. 189.

⁶ Subhas Chander v. Gavraya Pd. A. I. R. 1961, S. C. 878.

⁷ Suraj Baksh v. Ajudhia Singh, 1928 Oudh 350, 110 I. C. 91.

of fraud.¹

Other acts
of miscon-
duct

In cases of other kinds of misconduct also, full particulars should be given just as in case of fraud.² In case of breach of trust, facts showing how the opposite party came to hold the position of trust, what were the terms of that trust and what acts he did which amount to a breach of those terms, must be pleaded. The Allahabad High Court has held that where negligence and misconduct do not relate merely to a state of mind and arise out of a breach of duty or contract particulars must be given in the notice under section 80 C. P. C. and the plaint. In a suit for short delivery against a Railway the agreed route not having been mentioned in the notice under section 80 C. P. C. as the ground of negligence and misconduct was held to be an incompetent plea.³ There are many cases in which the actions of public bodies or officers are challenged on the ground of malafides. It was held in A. I. R. 1965 Andhra Pradesh 425 Kosa Raja Venketa v. Government of A.P. that the general and broad allegations of lack of bona fides are not sufficient. Some thing more specific, more direct and more precise is necessary to sustain such a plea.

In case of misrepresentation, it should be stated whether the representation made was oral or in writing,⁴ and if in writing, the writing must be identified. In cases in which negligence is pleaded, full details must be given of the acts which are alleged to constitute negligence.⁵ In cases where dismissal of a servant is justified on the ground of misconduct the acts of misconduct must be alleged,⁶ and a general allegation of misconduct is not sufficient.

The following are instances of some other cases in

¹ *Devi Prasad v. Chhotey Lal* A. I. R. 1966 All. 438.

² *Union of India v. Pandurang Kashinath More*, 1962 S. C. 630.

³ *Sahu Vanespati Traders v. Union of India* A. I. R. 1966 All. 333.

⁴ *Seligman v. Young*, 1884 A. W. N. 93.

⁵ *Gautret v. Egerton*, L. R. 2 C. P. 371; *Martin v. Teggart*, (1906) 2 Ir. R. 120.

⁶ *Saunders v. Jones*, 7 Ch. D. 435

which it is necessary to give particulars—

(I) *Suit for accounts* : Particulars should be given as to how the defendant is an accounting party, e. g., that he is a mortgagee in possession or an agent or a *lambardar*. It is not sufficient to say merely that the defendant is an accounting party. It should also be alleged how the particular position of the defendant as an accounting party arose, e. g., if he is an agent, when and how he was appointed agent, whether verbally or by a written agreement; if he is a mortgagee, the date of the mortgage-deed should be specified.

Particulars
in other
cases

(II) *Adoption* : It is not sufficient to say that A is the adopted son of B, but the party setting up an adoption should give particulars as to the person who adopted, to whom the adoption was made, the person adopted and his relationship with the adopter and the person who gave in adoption. If the adoption was made by a widow, it must be alleged whether it was done by the authority of the husband, or with the consent of Sapindas or without such authority or consent. In case authority or consent is pleaded, particulars as to when and how it was given should be alleged. If it was given in writing, the particulars of the document should be stated. If it is pleaded that no authority or consent was necessary it should be shown why it was not, e.g., by alleging that the widow was a Jain. It is not necessary to plead that all ceremonies necessary and essential were performed.¹

(III) *Adverse possession* : It is not sufficient to plead that a party has been in adverse possession for over 12 years. It should be definitely alleged how and when adverse possession commenced. For

¹ Sital Prasad v. Ram Prasad, 1943 (Nag.) 321.

example, that “On—, the defendant demanded his alleged share of profits from the plaintiff but the plaintiff refused to pay and denied that the defendant had any share in the property, and the plaintiff has been in exclusive possession ever since,” or that “In suit No.—, in the court of—, the plaintiff claimed a share in the property but the defendant in his written statement dated—denied the plaintiff’s alleged title, and has been in possession to the exclusion of the plaintiff ever since,” or that “On—, the defendant had dispossessed the plaintiff and has been in possession continuously ever since,” or that “the defendant has been openly and continuously in possession for more than twelve years to the knowledge of the plaintiff,” or that “the defendant has been in possession continuously for more than twelve years so openly that either the plaintiff was aware of his possession or ought to have been aware had he exercised due diligence.” (*Vide* Sri Chandra *v.* Baijnath, 1935 O. W. N. 25, 1935 P. C. 36). In the case of persons who are in lawful possession on behalf of others such as co-partners, licensees, co-owners or tenants, it is necessary to plead not only that such other persons had been excluded from the property but also that the exclusion had been known to the persons excluded as contemplated by Art. 127, Limitation Act of 1908 (Art. 65 of Limitation Act, 1963).¹ It has been held in Sindh that if hostile title is alleged it is not necessary to plead adverse possession in terms.²

- (IV) *Agreement* : Dates and names of parties to, and consideration of, the agreement, and whether it was in writing or oral, should be mentioned. In case it was in writing, the document should

¹ Sital Prasad *v.* Ram Prasad, 1943 (Nag.) 321.

² Abooluncker *v.* Saolihkhahin, 1949 Sind 12.

be properly identified. If the agreement is implied, the conduct, acts, conversation, or letters from which it is to be inferred should be indicated with sufficient accuracy, though it is not necessary to set them out in detail.¹ In a suit for breach of an agreement the exact condition broken and the manner of breach should be clearly specified.²

- (V) *Antecedent debt* : Where a transfer by a Hindu father is sought to be justified on the ground that it was made in lieu of antecedent debt, it is not sufficient merely to say so, but full particulars of the antecedent debt must be given, viz., the amount and nature of the debt, the name of the creditors, the date on which the debt was taken and how it was secured.
- (VI) *Benami* : Facts showing how the party pleading or the opposite party came to be *benamidar* should be pleaded, e. g., that the consideration was supplied by the plaintiff and the sale-deed was obtained in the defendant's name. When Sec. 66, C. P. C. is pleaded in defence, the defendant must allege that he is the certified purchaser, giving particulars of the sale certificate. For example, "the defendant is a purchaser certified under the sale certificate dated—, granted to him by the court of—in execution case No.—"
- (VII) *Breach of contract* : The exact manner in which the contract was broken must be stated in the words of the contract itself. If only one of the conditions is broken, the condition should be specified.
- (VIII) *Breach of duty* : The facts on which the duty is founded, that is, if it is founded on a contract

¹ O. 6, R. 12.

² *Jamshed v. Kunji Lal*, 1938 N. L. J. 392, 1938 (Nag.) 530.

the particulars of that contract, and if it is founded on statute a reference to that statute should be stated, as also the facts, which bring the case within the statute. The manner in which the breach took place or the facts constituting the breach should also be alleged.

- (IX) *Custom* : Full particulars of the custom must be stated showing its incidents and details, particularly when it is at variance with the general law.¹ It should also be alleged that the custom is reasonable, certain and immemorial and has been followed without interruption. Where a defendant pleaded that adoption of orphan is valid under Hindu law & custom and did not specifically plead a custom in modification, but as soon as plaintiff's first witness was examined, he was asked questions in cross examination about the custom, it was held that the parties knew what defendant's case was and his bad pleading should not prejudice the defendant.²
- (X) *Cruelty* : Particulars of the acts alleged to amount to cruelty should be given, with reference to date, time, and place.
- (XI) *Easement* : It is not sufficient to allege the right of easement generally but the nature of the particular easement and how it arose should be specified, as also the manner in which the right is claimed to have been acquired, e. g., by grant (actual or lost), or prescription, or under the Act.³ If it was an easement acquired by prescription it must be specifically alleged that the

¹ Sital Prasad v. Ranjit Singh, 1931 A. L. J. 390, 1931 (All.) 583.

² Pannalal v. Chimman Prakash, 1947 Lah. 547.

³ Manmath v. Rakhal, 1933 Cal. 215, 142 I. C. 458; Numia Mal v. Maha Dev, 1962 Punj. 299.

right was exercised for at least 20 years ending within two years of the suit, without interruption and *as of right*. If the easement is claimed against Government user for 30 years should be proved. As against a transferee of the Government; claimant can base his claim upon user for a total period of 30 years against Government and the transferee, or can ignore the prescription against Government and base the claim on 20 years user against the transferee. Where, the plaintiff had alleged the circumstance of the user by himself and his ancestors of land as pathway for 40 or 50 years the plaint was taken to cover the plea of long user leading to an inference of lost grant.¹ It is very important that the right was enjoyed *as of right*, and as an easement, because user as owner will not support a claim to easement.² In case of a private right of way the course and the termination of the alleged way should be shown with reasonable precision³ and also whether the right claimed is for walking or for cattle or for carts and vehicles, or for funeral or marriage processions⁴ etc. In pleading a public right of way, however, *termini* need not be set out. In pleading an easement on the basis of a lost grant, the essential fact to aver is user or enjoyment for a sufficient length of time which might give rise to the presumption of such grant.⁵ In case of easement of light, the purpose for which the dominant heritage has been used should be stated. If an extinction of the right of easement

¹ Manmath *v.* Rakhal *Ibid.*

² Lalit Kishore *v.* Ram Prasad, 1943 (All.) 362. Not followed in Mahesh Paratap *v.* Rampal, 1953 All. 591.

³ Haris *v.* Jenkins, 22 Ch. D. 481; Rammanohar *v.* Methila Prasad, 57 I. C. 151 (Pat.)

⁴ Ganga Sahai *v.* Khacheru Singh, 1964 A. L. J. 617.

⁵ Mahendranath *v.* Surajmal, 45 C. W. N. 17.

is pleaded, the way in which it was extinguished should be particularized.

(XII) *Immorality* : In a suit by a Hindu son for setting aside an alienation by his father, it is not sufficient simply to state that the debt was contracted for immoral or illegal purposes, but full particulars of those purposes should be given, i. e., it should be stated clearly how the debt was connected with the immoral pursuits of the borrower.¹ It will not be sufficient merely to explain the nature of the illegality but it should be alleged when and to whom the money was paid, and in what way it was applied to the illegal purpose. For instance it is not sufficient to say that the debt was taken to pay off gambling losses. Particulars of the gambling or wagering transactions on which the losses were incurred should also be given.

(XIII) *Justification* : Where a wrongful act is claimed to be justified, particulars should be given, e. g., that the act was done with permission or in self-defence or was due to pure accident, or was done under orders of a third person (in which case the name of that person should be disclosed and it should be shown that he had authority to give such order).² Where in a suit for libel, truth is pleaded as a justification and the libel consists of one specific charge, no further particulars are needed, except the particulars of the specific charge itself, e.g., if the charge is that A had illicit intercourse with B, the time

¹ *Tulshiram v. Bishnath*, 105 I. C. 885, 25 A. L. J. 753; *Jagdish Narain v. Hazarilal*, 140 I. C. 535, 32 A. L. J. 309; *Bal Rajaram v. Maneklal*, 34 Bom. L. R. 55, 1947 A. L. J. 752; *Shaukat Ali v. State*, 1956 A. L. J. 460

² *Thorne v. Tilbury*, 3 H. & N. 534; *Henderson v. Williams*, 1 Q. B. 521.

and place when and where he had the intercourse must be stated. But where the charge is a general one, e. g., that the plaintiff is a swindler, the defendant must give specific instances of conduct justifying such a description, with sufficient particularity to give notice to the plaintiff what the defendant means to prove to substantiate the truth of the alleged charge.¹ Where the defence was that the words complained of were fair comment upon facts which were matters of public interest, and that they were published on a privileged occasion, the defendant was ordered to give particulars of facts said to be matters of public interest, and of the circumstances of the occasion alleged to be privileged.²

- (XIV) *Legal necessity* : Where a Hindu father's transfer is sought to be justified by legal necessity full particulars of the actual necessity with such further facts as go to make that necessity a legal necessity, should be stated.
- (XV) *Representations* : Particulars should be given whether the representation was oral or in writing and when and where it was made. If in writing, the writing should be specified.
- (XVI) *Special damages* : It is not sufficient to allege the amount of damages suffered, but full details of the damages sustained should be given. For instance it is not sufficient to claim Rs. 500 as "cost of defence" in a suit for malicious prosecution, but details of the expenses incurred in defence should be given. In cases of breach of contract when plaintiff has suffered damages greater than those which ordinarily and usually arise from such breach, he must, if he wishes to recover the

¹ Gordon Summing v. Green and others, 7 T. L. R. 408.

² Subhas v. R. Knight, 101 I. C. 565, 54 C. 73, 1927 (Cal.) 729.

extraordinary damages prove that, at the time of the making of the contract, he communicated the special circumstances to the other party and the latter entered into the contract with knowledge of the special loss which would accrue to the plaintiff on a breach of that contract. Unless such notice is given, the damages are spoken of as too remote in law. An illustration of special damage of this character, which might arise in this country, is the case of a man wanting repair to machinery in a sugar mill. It may be that, if the repairer exceeds the stipulated time, the owner of the mill might suffer a great loss by losing part or whole of the season's profits, but unless he has told the repairer exactly what the circumstances are and the special loss which would accrue to him, he cannot recover that special loss. The facts that this notice was given and that the contractor undertook the work on the condition of being liable for special damages must, of course, be specifically pleaded.

- (XVII) *Title to property* : In cases when a party alleges himself to be the owner of land, he need not give any particulars of his title if he is in possession, but may simply allege his title, unless he admits the legal title of the other party and relies only on some equitable title in himself. For instance, a defendant in possession need not plead his own title but may plead that he is a *bona fide* transferee for value from an ostensible owner and may give particulars of that plea only.¹ When a party is not in possession, he must give full particulars of the title he pleads, e. g., if he pleads title as heir, he must allege how he is the heir,² if he pleads title by assignment

¹ *Milbank v. Milbank*, 1 Ch. 376.

² *Palmer v. Palmer*, 1 Q. B. 319.

he must show by what steps the estate became assigned to him.¹ If a title, short of absolute proprietorship, is pleaded, e. g., as mortgagee, lessee, etc., full particulars of the mortgage, lease, etc., should be given, e. g., who granted the mortgage or lease, when, and for how long. The nature of the deeds and documents on which a party relies in deducing his title from the person under whom he claims should be fully given. If title by adverse possession is pleaded it should be clearly so alleged.² The Oudh Chief Court has held that if in the course of pleadings the plaintiff clearly claimed title by adverse possession in the alternative, the fact that he did not allege this in plaint is immaterial.³

If both the parties are admittedly in joint possession, e. g., in a suit for partition of property, or for declaration of shares in a joint occupancy holding belonging to both the parties, particulars of the title to the share claimed should be given.

An interesting case in which full particulars of the title of the plaintiff were not alleged, and which therefore caused embarrassment to the defendant, arose in Bengal. X purchased some property. He conveyed a 6 anna share to his brother Y's sons, A, B, and C. A sold a 2 anna share to the defendants, X, B, C and D (fourth son of Y) sold $14\frac{1}{2}$ anna share to the plaintiff on the hypothesis that the sale by X to A, B, and C was really intended for the benefit of all the four sons of Y. The plaintiff brought a suit for partition and alleged that he was entitled to $14\frac{1}{2}$ anna share, and that the defendant was owner of $1\frac{1}{2}$

¹ Davis v. James, 26 Ch. D. 778.

² Shiromani Gurdwara v. Premdas, 140 I. C. 694, 13 L. 677; Karimullah Khan v. Bhampratap Singh, 1949 Nag. 65.

³ Municipal Board, Lucknow v. Mt. Kallo, 1949 Oudh 32.

anna share. He did not however allege how he came to be the owner of $14\frac{1}{2}$ anna share. He produced two sets of witnesses at the trial. One set proved that X and Y had jointly purchased the property (though in the name of X alone), in shares of 10 annas and 6 annas respectively, and that afterwards Y obtained the conveyance from X, only to complete his title, in the names of his three major sons A, B, and C, and after Y's death, all the four sons became owners of $1\frac{1}{2}$ anna share each, hence A, vendor of the defendant was owner of only $1\frac{1}{2}$ anna share. The other set proved that the property was acquired by X alone and was transferred by him for consideration, either to Y or to A, B, C and D and thus each of the four sons of Y became owner of $1\frac{1}{2}$ anna share. The defendant found himself in a position embarrassment when these contradictory allegations were sprung upon him. It was held that the plaintiff was bound to state in his pleading the nature of the deeds on which he relied in deducing his title and to show the devolution of the estate of himself. If he had been made to give these particulars, he would not have been able to produce this contradictory evidence as he could not have been permitted to allege two absolutely inconsistent statements of facts.¹

In cases, however, where the opposite party is estopped from denying a title, such title need not be pleaded. In a case for rent against a lessee, the lessor need not show his title. It is sufficient for him to plead that he let the property to the defendant at a certain rent, and that the defendant entered into possession under the lease. But if the suit is brought by the lessor's heirs, the title

¹ Moti Lal v. Judister, 22 C. D. 254, 31 I. C. 181, 20 C. W. N. 310.

of the lessor must be alleged to show that it was capable of passing by inheritance to the plaintiff.¹ The lessor may himself have been a tenant for life and the defendant would not be estopped from saying that his lessor's title has been determined by death.²

(XVIII) *Title of another person* : Similar particulars should be given when title is alleged in a third person, e. g., when a licensee of a third person claims right of possession as licensee, the title of his licensor should be pleaded with particularity. But when title is pleaded in the opposite party with the object of making him liable, it is not necessary to allege title more precisely than is necessary to show his liability. The reason is that a party may be presumed to be ignorant of his adversary's title. For instance, in a suit for rent against the assignee of the lessee after several mesne assignments, it is necessary to plead only that "all the rights and liabilities of the lessee have, by assignment, come to be vested in the defendant."³ So, in a suit for debt against the heir of the original debtor, particulars of the heirship of the defendant need not be pleaded with the same precision as would be necessary if the plaintiff claimed as heir of the original creditor.⁴

What particulars are required in other kinds of suits will be indicated in the footnotes to the precedents of such suits in Part II.

If the particulars are wrong, they can be corrected by an application for permission to amend them, and if they

Mistake in
particulars

¹ Cuthbertson v. Irving, 4 H & N. 742; Thriscutt v. Martin, 3 Ex. 454.

² Jones v. Stone, 1894 A. C. 122.

³ Cotes v. Wade, 1 Lev. 190.

⁴ Denham v. Stephenson, 1 Salk, 355.

are not corrected and the mistake is likely to mislead the other party, the party giving the particulars must suffer the consequence. But if the error or mistake does not mislead the defendant and the particulars given are sufficient to make the defendant understand what the plaintiff means, the error is of no consequence. For instance, in a suit on a pronote, the date and parties of which are correctly described but the amount of loan and the rate of interest are wrongly given but there were circumstances showing that the defendant had no difficulty in identifying the pronote, the defect was held not to be fatal.¹

Form of
particulars

Particulars should always be given in the pleadings themselves.² When they are very short and can conveniently be stated along with the fact to which they relate they should be so stated, but they should not be mixed up with the allegations of facts. Where they are long, they may be given in a separate paragraph following that in which the main fact is stated. For example :

(i) "The defendant has suffered the following speical damage :—	Rs.	A.	p.
Fee paid to counsel for defence	500	0	0
Expenses paid to his witnesses for travelling and diet ..	..100	0	0
Income which he would have made from his shop which remained closed for 5 days of the trial	200	0	0
TOTAL ..	800	0	0

(ii) "(1) The plaintiff is the mortgagor of the land of which the defendant is the mortgagee.

(2) The following are the particulars of the mortgage :.—

(a) Date :—

¹ Nama Giri v. Muthu, 111 I. C. 887, 1928 (Mad.) 940.

² O. 6, R. 4, C. P. C.

- (b) Name of mortgagor and mortgagee :—
- (c) Sum due :—
- (d) Rate of interest :—
- (e) Property subject to mortgage :—

When, however, the particulars to be given are very long, e. g., account in a suit for money, or long specification of the property claimed in suit, it is more convenient to separate them from the text and to enter them at the foot of the pleading, shortly referring to them in the body of the pleading in some such way as :—

“The defendant has borrowed money from the plaintiff from time to time, and has also made some payments on account, full particulars of which are given at the foot of the plaint,” or

“As per account given at the foot of the plaint, the defendant owes the plaintiff the sum of Rs. 500 as balance”, or

“The plaintiff’s father was owner of several items of landed and house property details of which are given in schedules A, B and C at the foot of the plaint.”

When the particulars are too voluminous to be included in the plaint they may be annexed thereto or delivered separately and the fact stated in the plaint.¹ According to the Bombay High Court Rules in suits for debts filed in the original side of that court particulars of the plaintiff’s claim are required to be annexed to and filed with the plaint. According to English practice if particulars are less than three folios in length they should be set out in the pleading but if more, a statement to that effect should be inserted and particulars delivered separately.

When particulars are ordered under O. 6, r. 5, C. P. C., they may be delivered in the following form :

Particulars delivered in pursuance of the order of court, dated—, passed on the application of the defendant :—

¹ Ram Prasad *v.* Hazarimall, 58 C. 418, 134 I. C. 538, 1931 Cal. 458.

1. The following are the particulars of the fraud alleged by the plaintiff in para. 4 of his plaint :—

(State the particulars in paragraphs.)

2. The following are particulars of the damages claimed by the plaintiff :—

(State the particulars in paragraphs.)

OR

The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the _____ of _____.

(Here set out the particulars ordered in paragraphs if necessary.)

They need not be stated in the form of an application, and then no court-fee stamp will be required.

If any particular form is prescribed by any High Court, particulars should be delivered in that form. The Madras H. C. in the original side has prescribed that the particulars should be drawn up in the form prescribed for the written statement of a defendant and shall be endorsed with a reference to the order directing the same.

Pleading to
Particulars

Particulars are part of the pleading when contained in it and must be deemed to be so even if separately delivered. The opposite party should therefore plead to particulars and where particulars are delivered after the pleading of the opposite party, the latter should ask for leave to file additional pleading in answer to the particulars.

(For rules regarding giving and ordering further particulars, *and consequence of not delivering them* see Chapter IX.)

CHAPTER VII

Alternative and Inconsistent Pleadings

There is nothing in law to prevent a plaintiff from re-lying upon several different rights in the alternative, or to prevent a defendant from raising as many distinct and separate defences as he likes.¹ Such pleas or rights may even be inconsistent. A party to a suit may set up such set of facts as may give rise to different rights in law. He may rely upon one set of facts for his success, failing which he may fall back upon the other set of facts. Neither O. VI R. 2 C. P. C. nor any other provision of the code prohibits a party from taking alternative or inconsistent pleas. Equity and Justice demands that a party should not be precluded from taking such pleas. What is necessary is that all the facts should clearly and distinctly be stated and there should be no prejudice to the other party. In case of such an apprehension the court may take recourse to O. VI R. 16 C. P. C. and pass orders for amending the pleading or for striking out any portion of it. The party may also be put to election. For instance, a plaintiff may sue for possession of a house belonging to A, claiming ownership, either as the adopted son of A, or under a will executed by A in his favour. He may claim proprietary right in a land, or, in the alternative a right of easement.² In one case,³ the Allahabad High

Alternative
pleas

¹ Firm Srinivas Ram Kumar *v.* Mahabir Pd., 1951 S. C. 177; Dhana-pal Chettiar *v.* Govind Raja Chetty, 1961 Mad. 262.

² Sri Ram *v.* Mani Ram, 21 A. L. J. 569; Narendra Nath *v.* Abhoy Charan, 4 C. L. J. 437 (F. B.), 34 C. 51 (F. B.); Amrita Nath *v.* Jogendra, 1924 (Cal.) 369; Tamanbhat *v.* Kustocharya, 144 I. C. 998, 35 Bom. 8 L. R. 144, 1933 Bom. 122; Mahesh Pratap *v.* Rampal, 1953 All. 591; Raychand *v.* Maneklal, 1946 Bom. 266 (F.B.); Narendra Nath *v.* Abhoy Charan, 34 Cal. 51 (F.B.).

³ Dwarka *v.* Ram Ratan, 128 I. C. 755, 1930 A. L. J. 1057, 1930 (All.) 815.

Court strongly condemned the action of the plaintiff in bringing his suit for possession on the ground of ownership or in the alternative for injunction on the ground of easement and held that the trial courts should have put the plaintiff to election; but it is submitted that there was nothing wrong in bringing the suit on an alternative basis. A party may claim ownership and easement rights in the alternative.¹ A pre-emptor may claim partial pre-emption alleging vendor's want of title to the portion not claimed, and in the alternative pre-emption for the whole if court found vendor's title to the whole.² Similarly in a suit for pre-emption there is nothing to prevent a defendant from setting up a plea of estoppel in addition to a plea denying the custom of pre-emption.³ A person who claims under a sale-deed from a Hindu widow might support his title by pleading that the husband of the widow was a separated Hindu, hence the widow was the owner of the property which she had sold to him or, in the alternative, if he was a member of a joint Hindu family, the widow having been in possession for over 12 years, should be regarded as having become owner by adverse possession. Similarly, a suit for a declaration of proprietary title or in the alternative for pre-emption, is maintainable.⁴ Similarly, a defendant may plead in a suit on a bond that he did not execute it, and in the alternative that the claim is barred by limitation. But facts on which each alternative claim or defence is based must be distinctly and separately stated.⁵ If they are not clearly set out, the court will not permit an attempt to show that any particular ground can be covered by implication from certain allegations. Thus, in a suit by a son to set aside certain transfers made by his mother

¹ *Sayrabai v. Ahmedji A. I. R. 1960 M. P. 111.*

² *Afzal Husain v. Huran Bibi*, 27 A. L. J. 589, 116 I. C. 16, 1929 (All.) 398; *Rambhau v. Ganesh Deorao*, 1948 Nag. 32.

³ *Sankaranarayana Iyer v. The Kotayam Bank Ltd.* 1950 Trav-coch. 66.

⁴ *Bhagwati Saran v. Parmeshar Das*, 12 A. L. J. 798, 25 I. C. 283, 36A, 476.

⁵ *Official Assignee v. Baidya*, 30 C. L. J. 428, 24 C. W. N., 145 I. C. 181, cf. O. 7, R. 831.

the plaintiff simply alleged that his mother was at the time of making the transfers of unsound mind, and added that the donee was residing with the said mother who was entirely under her dominion and control and the donee was well aware of the mental condition of the donor. The Privy Council held that on these allegations the plaintiff can be said to base his claim only on unsoundness of mind of the donor and a claim on the ground of undue influence cannot be entertained, because if he wanted to make an alternative case of undue influence he ought to have pleaded that separately. The statement that the donor was under the dominion and control of the donee was considered to have been made only incidentally in connection with the allegation of mental incapacity.¹

The question which often arises in this connection is whether a party is entitled to plead even inconsistent facts in the alternative. In England, a party was not formerly permitted to raise inconsistent pleas, but the Judicature Act has enlarged the liberty of parties, and, since the passing of that Act, inconsistent claims and defences are freely made so much so that denials of indebtedness and pleas of payment are freely permitted. The only qualification is that a party is not entitled to put forward a pleading which is embarrassing to the opposite party, and, unless the inconsistency in his pleas is such as to cause embarrassment to the other party, he is not debarred from alleging any alternative, though inconsistent facts.

Inconsis-
tent pleas

In India there is no statutory rule on the point. The Allahabad High Court has held in a case,² that a plaintiff may set up two inconsistent cases, though this circumstance might militate strongly against the plaintiff succeeding in the case. That was a suit for a declaration that a bond was not executed by the plaintiff or at least for a declaration that it was null and void for want of actual and valid consideration. A contrary view taken in Madras in a

¹ *Ismail v. Hafiz Boo*, 33 C. 773, 33 I. A. 86.

² *Jino v. Nanen*, 18 A. 125; *Sheonarain v. Bhallad*, 1950 All. 352.

case¹ in which the plaintiff alleged that the sale-deed executed by her was a forgery and in the alternative, that no consideration was received or that fraud was practised upon her, was expressly dissented from in this Allahabad case. The Allahabad view is in consonance with the decision of the Supreme Court in *Firm Srinivas Ram Kumar v. Mahabir Prasad*.²

General
principle

The following may be taken to be the general rule :—

There can be no objection to preferring alternative and inconsistent claims or raising inconsistent pleas, provided they are based on facts which are not inconsistent.³ Even inconsistent facts are not prohibited as a matter of law, but inconsistent claims or inconsistent pleas which are based on facts which are so inconsistent that the evidence required to prove one fact is destructive of the other fact, should be discouraged,⁴ except when the facts are not within the personal knowledge of the party pleading them.

A few illustrations will elucidate this : A decree-holder can attack a transfer as sham and in the alternative as fraudulent.⁵ A mortgagor may allege that the mortgage money has been paid and may, in the alternative offer to pay the portion that may still be found to be due.⁶ A plaintiff in an ejectment suit may claim a decree on the ground that the defendant is his tenant or that he is a trespasser.⁷ Similarly, a defendant in an ejectment suit may claim tenant's right or title by adverse possession.⁸ In a suit for possession under a deed of *waqf* the defendant pleaded that she did not execute the deed, and that the plaintiffs who were related to her deceived and falsely

¹ *Iyyappa v. Ramalakshmma*, 13 M. 549.

² 1951 S. C. 177.

³ *Woodroffe and Amer Ali's*, C. P. C., page 680; *S. Narayan v. K. Bank*, 1950 Tr. Co. 66 (F. B.); *Firm Srinivas v. Mahabir*, 1951 S. C. 177.

⁴ *Motilal v. Judhistir*, 20 C. W. N. 310, 22 C. L. J. 254, 31 I. C. 181.

⁵ *Ouseph Skaria v. Cheman Joseph A. I. R.* 1965 Ker. 288.

⁶ *Butchanna v. Vernahalu*, 24 M. 408.

⁷ *Lakshmibai v. Hari*, 9 Bom. H. C. R. 1.

⁸ *Chhaikuddin v. Ram Narain*, 1926 (Cal.) 364, 90 I. C. 670.

told her that in order to facilitate the management of her property, she should get a deed completed, suggesting thereby that the deed was obtained from her, without her being actually told what it was, by fraud and undue influence. The pleas of denial of execution and fraud were allowed as there was no inconsistency in the facts on which they were founded.¹ Similarly, a defendant may deny her marriage with the plaintiff and may, in the alternative, plead that if the ceremony which she went through with him amounted to marriage it was null and void, as her consent was not taken. In a suit, by an adopted son, the defendant who claimed under a deed of gift from the widow of the adoptive father was allowed to deny the adoption, and at the same time to plead that, even if the adoption was made, it was conditional on the provision of the will in favour of the widow being acquiesced in by the plaintiff's natural father,² because the defendant was no party to the will or the alleged adoption. When a plaintiff sued as reversioner of his maternal grandfather A and the defendant claimed under a sale-deed from a daughter of A, the defendant was allowed to plead that the sale by the daughter was justified by legal necessity, and, in the alternative, that A had left a son on whose death, the property passed to A's widow, as mother, and, on her death, the plaintiff became entitled to the property and he lost that right by adverse possession of A's daughter.³ The reason is that though the two pleas, one involving an admission of the title of A's daughter and the other involving a denial of it, are inconsistent, yet the inconsistency causes no embarrassment and the evidence of the two pleas is by no means conflicting. A plaintiff sued for enhancement of rent on the allegation that the rent was produce rent, but, as it was wrongly entered in survey records as cash he accepted the entry and wanted enhancement. It was held that

¹ *Farid-un-nisa v. Mukhtar*, 40 I. C. 488, O. L. J. 230.

² *Narayan Swami v. Ramaswami*, 14 M. 172.

³ *Sri Rang v. Rantheyya*, 13 I. C. 128, 13 C. L. J. 439.

there was no inconsistency in the claim.¹ A suit for declaration of plaintiff's proprietary right, and, in the alternative, for pre-emption,² is also maintainable, and so is a suit for a declaration that the plaintiff is owner under a sale-deed, or, in the alternative, on the ground of adverse possession for though ownership and adverse possession are inconsistent things, yet there is no conflict in the evidence which would be required to prove either. A party may plead ownership and right of easement in the alternative.³ A gift may be attacked as non-existent and in the alternative as made to defraud creditors.⁴

But a plea of payment should not ordinarily be permitted to be joined to a plea that the bond is a forgery and that defendant never borrowed the money. Nor is it proper to permit a defendant to deny a contract and allege that it was intended to be a wager. But if he is the representative of the original party he may be allowed to raise both these defences, if he has no personal knowledge of the transaction. For example when the sons were sued for money misappropriated by their deceased father they were allowed to plead alternatively that there was no misappropriation and that the father having acted dishonestly and his acts amounting to a criminal offence, the sons are not liable under the Hindu Law.⁵ But the Allahabad High Court held, on the authority of English procedure, that the pleas that defendant did not execute the bond and that he has paid it up can be taken together, and that such pleas are generally taken as a matter of tactics when it is intended to force the plaintiff into the witness-box to prove the deed and thus to get an opportunity to cross-examine him with regard to the other pleas.⁶ Similarly it is permissible in a suit for libel to plead

¹ *Parmeshwar v. Ramanandan*, 42 I. C. 620, 2 Pat. L. J. 226.

² *Bhagwati v. Parmeshwar*, 36 A. 476.

³ *Laxminarayan v. Fajjulal*, 1933 (Nag.) 257. See also cases under Page 76.

⁴ *State of Punjab v. Giani Birsingh* A. I. R. 1968 Punj. 479.

⁵ *Toshanpal v. The District Judge of Agra*, 51 A. 386 (at p. 391).

⁶ *Muhammad Zafar v. Zahur Hasan*, 49 A. 78.

that the words complained of were not published of, and concerning, the plaintiff and that they constituted fair and *bona fide* comment.¹

Even when in theory inconsistent pleadings are allowed a pleader would be ill-advised to raise them, for a judge is likely to come to the conclusion that a pleader who has to rely on inconsistent statements has a case of very little merit. It is a great risk for any pleader to take, for, if the pleas are contradictory, they work out their own retribution by disproving each other to the extent of that contradiction.² The Bombay High Court in a writ petition observed that objections to the petition on the ground of delay and that it is premature are mutually destructive.³ A pleader should rather decide on one line of defence without introducing matters which will certainly give rise to suspicion. Where, however, a party is, from obscurity or from complexity of facts in honest doubt as to the relief available to him, inconsistent claims may be entertained.⁴ Inconsistency may be a ground for viewing both allegations with suspicion but does not render the suit unsustainable.⁵ It is certainly open to a party to raise inconsistent defences in the alternative but at the same time when evidence is led he has got to elect as to which of the two alternative or inconsistent defences he is going to prove.⁶

¹ Union Benefit Guarantee Co. v. Thakor Lal, 161 I. C. 769, 1936 (Bom.) 114.

² Gaura v. Sri Ram, 1929 (Nag.) 205.

³ Damomal v. Union of India A. I. R. 1967 Bom. p. 355.

⁴ Mt. Daiwati v. Mt. Tunki, 164 I. C. 804, 1936 (Pat.) 474.

⁵ Sheo Narain v. Bhaller, 1950 All. 352.

⁶ Raychand v. Maneklal, 1946 Bom. 266 (F. B.).

CHAPTER VIII

Variance between Pleading and Proof

Variance
between
Pleading
and proof

As a general rule, a plaintiff is bound by his pleading and should not be allowed to contradict the facts stated therein, or to succeed on a case not made out in his plaint¹ but incidental mention of particulars about ornaments in the schedule cannot be considered as irrebuttable.² From the fact that a party can raise several alternative and inconsistent pleas it does not follow that if he has raised only one plea, he can be permitted to raise another at a later stage of the case. He must be held to the claim or defence set up by him in his pleading and cannot be allowed to build a case inconsistent with that in his pleading,³ although he could, if he chose, allege that other ground of claim or defence in his original pleading. In *Rudra Pratap's* case the defendant lady denied the genuineness of the pronote which was put in issue, but while giving evidence at the trial she admitted her signature and proceeded to set up an entirely new case by explaining how her signature was obtained. The Chief Court of Oudh strongly deprecated this. Their Lordships of the Privy Council characterized⁴ as irregular the procedure of the trial court in allowing evidence to be adduced on points not raised in the pleadings or issues

¹ *Janardhan v. Pradhan*, 22 Pat. L. T. 666.

² *Waziran v. Rashidan*, 1937 (All.) 783, 172 I. C. 61.

³ *Motilal v. Judhistir*, 22 C. L. J. 254, I. C. 181; *Kali v. Birendra*, 22 C. L. J. 309; *Annandacharan v. Hargovind*, 27 C. W. N. 2496, 37 C. L. J. 552, 1922 (Cal.) 570; *Gopal v. Abdul*, 65 I. C. 640, 34 C. L. J. 319; *S. M. Gopala v. Secretary of State*, 101 I. C. 346 (Mad.); *Ratan Singh v. Manak*, 20 S. L. R. 220, 1927 Sindh 219, 109 I. C. 183; *Gondli v. Joynai*, 26 C. W. N. 294; *Esher Chander v. Shama Churn*, 11 M. I. A. 7 at pp. 20, 23; *Maganlal v. Krishna Bibi*, 1935 (All.) 303, 153 I. C. 1068; *Rudra Pratap Narain Singh v. Gajraj Koer*, 1 O. W. N. 1414, 1935 (Oudh) 165, 152 I. C. 977.

⁴ *Hemchand v. Peareylal*, 1942 (P. C.) 64.

and held that this should not have been allowed without amendment of pleadings and issues. But in seeing whether there has been a variance between pleading and the case set up at the trial, a court should not look merely to the wording of the plaint but also to the issues and to the manner in which the case was fought out.¹ A plaintiff cannot be allowed to abandon his case and adopt that of the defendant and claim relief on that footing.² Similarly, a plaintiff who claimed by right of survivorship cannot at a late stage claim decree as heir,³ nor was a plaintiff who based his suit wholly on the allegation that the suit land was a burning ground allowed to contend at the trial that the land was also a graveyard,⁴ nor was a decree allowed on the ground of possessory title when the proprietary title on which the claim was based was not proved.⁵

In the absence of pleading plaintiff was not allowed to rely upon an acknowledgment to save limitation⁶ nor in a suit on the basis of title to contend in appeal that he was in possession and had rights under section 53A Transfer of Property Act,⁷ nor to raise the plea of rights as an inferior owner in a suit for damages for diversion of water on the ground of title.⁸ In a writ petition the employee, who had denied any inquiry was in the absence of pleading was not allowed to contend at the hearing that procedure at the inquiry had been illegal and he had not been given proper opportunity to lead evidence.⁹ Similarly, the defendant who had not taken this case in written statement

¹ *Sagar Mal v. John Carspiet*, 124 I. C. 887; *Bejoy Kumar v. Satish Chandra*, 1936 (Cal.) 382; *Mohammad v. Secretary of State*, 1939 (Lah.) 330, 186 I. C.

² *Nagendra v. Pyari*, 20 C. W. N. 319, 21 C. L. J. 605.

³ *Kamalakant v. Madhvji*, 37 Bom. L. R. 405, 1935 (Bom.) 343; *Thimmiah v. Narrayanappa*, 15 Mys. L. J. 418.

⁴ *Ranglal v. Lakshmidhar*, 1945 (Pat.) 92.

⁵ *Redden v. Vadla*, 1946 (Mad.) 537.

⁶ *Ram Padarath Thakur v. Harinarayan Pd.* A. I. R. 1965 Patna 224.

⁷ *Illikkal Devasavom v. Potta Kokatt* A. I. R. 1960 Ker. 96.

⁸ *Siv Ranade v. Union of India* A. I. R. 1964 S. C. P. 24.

⁹ *Model Mills Nagpur v. State Industrial Court* A. I. R. 1967 Bom. 382.

was not allowed to dispute the date of birth mentioned by the plaintiff in the plaint.¹ In a title suit for declaration, injunction and possession in the alternative on attaining majority the plaintiff alleged that his mother was the guardian but in evidence he introduced his uncle-in-law as the person factually looking after his property. This variation between pleading and proof was discredited². A plaintiff claiming title under a sale-deed which defendant pleaded was bogus was not allowed a decree on the ground that he was *benamidar* for his vendor.³ Where a plaintiff had failed to prove the case of negligence set up by him he was not allowed in the appellate court to ask the court to find negligence established on a quite different *species facti*.⁴ But it has been held in two cases of Nagpur that a plaintiff who fails to prove all the facts alleged by him may yet obtain the whole or any part of the relief if the facts pleaded by the defendant and found by the court show him to be entitled thereto. In one case the plaintiff sued as assignee of a mortgagee, the defendant pleaded that the assignment was sham and bogus. It was found that the assignment was made *benami* and plaintiff was *benamidar*. The suit was decreed on the ground that a *benamidar* can always sue in his own name.⁵ In the other case, plaintiff in a suit on a bond pleaded cash consideration and the defendant while admitting execution denied the receipt of cash and it was found that there was no cash consideration, the court held that relief could be given on the basis of admission of execution by defendant.⁶ In a suit based on a promissory note defendant pleaded want of consideration, the consideration being unlawful and against public policy. The evidence related to some sort of breach of contract. This was held to be at variance with the defence and prejudicial to the other

¹ 1966 Ker. L. J. 1076.

² Hadu Parida v. Sama Govinda Misra A. I. R. 1970 Ori. 32.

³ Bhushanchandra v. Manujendra Dutt, 1940 (Cal.) 148.

⁴ Raymond v. Alice, 63 M. L. J. 275, 1932 P. C. 95, 136 J. C. 451.

⁵ Narayan Rao v. Hanumant Rao, 124 I. C. 453, 1923 (Nag.) 273.

⁶ Bhikulal v. Ganpat Sita Ram, 1941 N. L. J. 530, 1942 (Nag.) 12.

party.¹ Similarly where in a case the plaintiff sued for refund of money said to have been paid to defendant for payment to a third person on plaintiff's behalf for price of fruits purchased by the plaintiff and the defendant admitted the deposit of the money but pleaded that the plaintiff had appointed him arbitrator to decide a dispute between plaintiff and another person and had deposited the money as evidence of his *bona fides* the Judicial Commissioner of Peshawar held that the suit should have been decreed.² Similarly, when plaintiff pleaded a certain set of facts and in reply defendant pleaded another set of facts which also by themselves would entitle the plaintiff to a decree, though set up by the defendant as an exception and neither the plaintiff succeeded in proving his case nor the defendant in proving his exception, the Mysore High Court allowed a decree on the facts pleaded by the defendant.³ In a Calcutta case, the plaintiff simply denied the genuineness of a deed of gift but the court while holding the document proved rejected it on the ground that the transaction was extremely questionable. It was held that forgery and fraud being inconsistent pleas, the court should not have rejected the deed on a ground not set up by the plaintiff.⁴ Where the plaintiff alleged definitely a contract of a particular date, the Lahore High Court refused to permit him to prove a contract of a different date.⁵ When a sum is claimed as *Lambardari Haq*, it cannot be decreed as *Mukaddami Haq*.⁶ In a suit for rent on the ground of a *Kabuliyat*, the *Kabuliyat* could not be proved and the plaintiff was not allowed in second appeal to support his claim on the principle of part performance,⁷ nor can he, in such a case, get a decree for damages for use

¹ Indermal Tikaji Mahajan *v.* Ram Prasad Espilal A. I. R. 1970 M. P. 40.

² Faizul Kamdar *v.* Hafiz Nazi, 141 I. C. 769 (Pesh.).

³ Devanna *v.* Madappa, 14 Mys. L. J. 305.

⁴ Kalanjan *v.* Sahajana, 111 I. C. 746, 1929 (Cal.) 77.

⁵ Jugal Kishore *v.* Paraslal, 1930 (Lah.) 325.

⁶ Bani Bai *v.* Mahadeo, 106 I. C. 659 (Nag.)

⁷ Ganga Prasad *v.* Sukhdeo Sahu, 100 I. C. 566 (Al.).

and occupation without amending the plaint.¹ The Patna High Court, has held that where the defendant pleaded an express contract of waiver of enhancement, and failed to prove it, the court cannot infer waiver from other circumstances.² Similarly where plaintiff definitely alleged that contracts were signed by B under express authority of the proprietors it was held that they could not subsequently allege that B must be taken to have implied authority on behalf of the proprietors to enter into the contract.³

Their Lordships of the Privy Council held in a case that a court has no jurisdiction to consider a question and grant a declaration on its basis, which question is not in issue and is precluded from argument due to the admission of plaintiff, without amendment of pleadings.⁴ A party can only succeed on what was alleged and proved "*Secundum allegatta et probata*". A party is therefore expected and is bound to prove the case as alleged by him and covered by the issues.⁵ The Supreme Court has affirmed that the ordinary rule is that evidence is to be given on a plea properly raised and not in contradiction to it.⁶ In a case where a commercial concern of Bundi State was purchased by a company and in lieu of part payment of consideration, fully paid up ordinary shares were alleged to have been issued, the evidence led showed that the shares were issued as price of good will of the agency transferred. This variation in pleading and proof was held to be against law. Since the defendant Company had not raised any objection and the lower court gave its decision on the point, the Rajasthan High Court also decided

¹ *Triveni v. Ram Dass*, 105 I. C. 43 (Nag.) *contra* *Rangaraju v. Gedala*, 97 I. C. 935, 1926 (Mad.) 107; *Hazi Md. v. Hyderabad Municipality*, 1944 (Sind.) 49.

² *Kamandas v. Radhika*, 1929 (Pat.) 717, 79e; *Radi Bros. v. Firm Bhagwan Das*, 1945 (Lah.) 35.

³ *Ralli Bros. v. Firm Bhagwandas*, 1945 (Lah.) 35.

⁴ *Attorney General of colony of Fiji v. J. P. Bayly Ltd.*, 1950 P. C. 73.

⁵ *Bhohimder Singh v. Charan Singh*, 1950 E. P. 256.

⁶ *Om Prabha Jain v. Abnash Chand A. I. R.* 1968 S. C. 1083.

the point.¹ The true scope of the rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another issue which was not in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to a trial with the knowledge that a particular question is in issue though no specific issue has been framed thereon and adduce evidence thereon.²

The Supreme Court has held in a recent case that a Plea about the non-maintainability of a suit can be accepted without any specific plea or any precise issue.³ In another case where conflicting claims were set up by the parties on the basis of two sale deeds, the Supreme Court held that the court could hold that one of the sale deeds was contingent and was to take effect if the other sale was not completed, though there was no such plea.⁴

But, the only reason for this rule being that a party will be seriously prejudiced if his opponent is allowed to substantiate a case different from that pleaded,⁵ every variance between pleading and proof is not necessarily fatal,⁶ and a slight variance will not be regarded as such.⁷ Every such variance should be carefully watched to see that the opposite party is not taken by surprise,⁸ as in all such cases, the real test is whether the other party has been taken by surprise,⁹ and where there has been no surprise and parties

Every
Variance
not fatal

¹ State of Rajasthan *v.* Bundi Electric Supply Co. Ltd. A. I. R. 1970 Raj. 36.

² Nagu Bai *v.* Shama Rao, 1956 S. C. 593.

³ State of Raj. *v.* Rao Raja Kalyan Singh, A. I. R. 1971 S. C. 2018.

⁴ P. V. Ayyappa Reddian *v.* Ayyapan Janardhan Pilla, A. I. R. 1971 S. C. 2092.

⁵ Gendli *v.* Joynal, 26 C. W. N. 294, 64 I. C. 565, 35 C. L. J. 103.

⁶ Bankey *v.* Gudo, 1930 (Pat.) 476; Krishnaji *v.* Secretary of State, 1937 (Bom.) 449. Balram Das Agarwal *v.* Kesar Dev Khemka 71 C. W. N. 51.

⁷ Ghulam *v.* Azim Bibi, 139 I. C. 662, 1932 Lah. 570.

⁸ Danmmu Narasingha, 1940 (Part.) 187.

⁹ Ratanshani *v.* Bannuji, 1925 (Nag.) 434; Krishnaji *v.* Secretary fo State, 1937 (Bom.) 449.

have understood what each wanted to prove and what the real issue was and justice is better done by deciding the case on the merits as presented by the parties, this technical rule need not be enforced,¹ and the defect in pleading may be remedied by amendment, if necessary.² The Supreme Court has held that the doctrine that relief should be founded on the pleadings of the parties should be applied in the light of the principle that considerations of form cannot override legitimate considerations of substance. Therefore if a plea though not specifically made is yet covered by an issue indirectly or by implication and the parties knew that the plea was involved in the trial and led evidence about it. The objection that it was not pleaded is not maintainable. On this principle on failure of proof of tenancy a suit for possession was decreed on the ground of defendant's possession being by leave and license appearing from defendant's stand.³ The Patna High Court has held that a plea not raised in pleading may be entertained at a late stage sometimes even in appeal provided there is no prejudice to the other party and all material and facts to supply the basis of the plea are already on record.⁴ The same High Court allowed the plaintiff to rely on title by adverse possession at the appellate stage where the pleading and findings of the court below disclosed continuous possession of plaintiff for over twelve years but there was no specific plea of adverse possession in pleadings.⁵ The Kerala High Court has held that there is nothing improper in giving plaintiff relief upon the case the defendant himself has taken up expressly even though the plaintiff has not taken up this alternative case in the pleadings in spite of the fact that he

¹ *Anoda Chandra v. Bhojalal*, 50 C. 292, 1923 (Cal.) 142; *Jugal Kishore v. Gomti*, 25 I. C. 280 (All.), *Ghulam v. Mahomed*, 144 I. C. 467, 1933 (Lah.) 342. *Ramdas Trust v. Damodar Das* 1967 Raj. L. W. p. 273.

² *Motabhoy v. Mulji*, 13 A. L. J. 529, 39 B. 399, 17 Bom. L. R. 460, 17 M. L. T. 402.

³ *Bhagwati Pd. v. Chundremaul* A. I. R. 1966 S. C. 735.

⁴ *Vaidya Nath Sahai v. Ram Badan Singh* A. I. R. 1966 Pat. p. 383.

⁵ *Mir Md. Siddique v. Keshwai Singh* 1967 L. I. R. 46 Pat. 1103.

could have done so.¹ Where even though a plea was not set up in the pleading, the pleader for the party setting it up openly declared at the trial to the knowledge of the other party his intention to produce evidence in proof of that plea, the other party produced rebutting evidence, and the trial court considered and decided it, it was held that the appellate court cannot shut its eyes to such a plea simply because it was not taken in the pleading.² The better procedure, however, is that the Judge should insist upon an amendment of the pleading and if necessary should direct further issues to be raised and further opportunity to be given to the other party to meet the altered case.³ In another case where the plaintiff raised a new case at the time of the hearing and led evidence in support of such new case and the defendant did not ask for an adjournment to rebut the new case set up by the plaintiff, it was held that the decision on such new case was not vitiated.⁴ In a suit for declaration that an adoption made by the plaintiff, a widow, was null and void on the ground of fraud, it was alleged that she was made to sign the adoption deed on the representation that *Pattas* had to be written, and she, relying on the word of the defendant who looked after her business, and in the absence of any independent advice, signed the deed. It was held that the court could give relief even if it found a case of undue influence established instead of fraud.⁵ Where plaintiff sued on the ground of title, the court gave him a decree on the ground of possessory right when it was satisfied that the defendant was not taken by surprise and had a fair and adequate opportunity to meet the case.⁶ In a suit for prompt dower based on an express agreement, the Patna

¹ *Lakeshmi Kuttis v. Narain Pillai* A. I. R. 1968 Ker. 57.

² *Satgur v. Har Narayan*, 111 I. C. 817, 1929 (Oudh) 44; *Budhulal v. Ram Sahai*, 9 O. W. N. 523, 138 I. C. 808, 1932 (Oudh) 244.

³ *Nagardas v. Vali Mohd.* 32 Bom. L. R. 454.

⁴ *B. N. Railway v. Moolji*, 1929 (Cal.) 654.

⁵ *Narayan Bhat v. Akkerbai*, 33 I. C. 576, 18 Bom. L. R. 27; *see also Muhammad Ibrahim v. Umutulla*, 39 I. C. 798.

⁶ *Karuppanan v. Sundara*, 1939 M. W. N. 1179, 110 L. W. 65.

High Court held that the court could pass a decree on the basis of Muhammadan Law in the event of the agreement not being proved.¹ Where plaintiff claimed title to land as reformation *in situ* the court gave him a decree on the ground of accretion.² Where the defendant pleaded *resjudicate* which is only a plea of estoppel by judgment and circumstances disclosed on the record made out another species of estoppel, it was held that there was no reasonable ground for refusing relief to him.³

Where in a suit for specific performance of a contract, in part performance of which the plaintiff alleged to have paid to the defendant some money, the defendant denied the contract and pleaded that the money was taken by him as a loan, the court can pass a decree for recovery of the loan in favour of the plaintiff, on his failure to prove the contract even though the plaintiff had failed to plead and claim relief on this alternative basis.⁴

In a suit for rent on the ground of defendant's tenancy which was not proved, plaintiff cannot be granted decree for damages for use and occupation in second appeal.⁵ In a suit for ejectment of the defendant alleged to be a tenant, if the tenancy is not proved but it is found that the plaintiff is the owner and the defendant has been in occupation under permission of the plaintiff or his predecessor, according to the Nagpur, Patna, Allahabad, Sindh and Oudh Court plaintiff could get a decree,⁶ but according to Calcutta and

¹ Mahbubani v. Muhammad, 8 Pat. 645, 117 I.C. 207, (1929 (Pat.) 207.

² Sarat Chandra v. Bhupendra, 56 C. I. J. 263.

³ Chiranji Lal v. Ram Kanwar, 1948 East Punjab 26, Zingu v. Mahadeo, 1948 Nag. 358.

⁴ Firm Sirinivas Ramkumar v. Mahabir Prasad, 1951 S. C. 177; Permanandas v. Shankar Path, 1951 Orissa 11. Khali Panigrahi v. Kamala Devi A. I. R. 1967 Orissa 100.

⁵ Paturu v. Gunupati, 1949 Mad. 421, 1948 M. W. N. 761, 1448—2 M. L. J. 542.

⁶ Ratanshani v. Bannuji, 1925 (Nag.) 434; Ram Dahin v. Ram Dhani, 1942 (Pat.) 379; Saral v. Sudama, 1946 (Pat.) 103; (*contra*) Seetha v. Jagannath, 1944 (Pat.) 312; Bal Mukand v. Dalu, 25 A. 498; Mulibai v. Vassibai, 97 I. C. 248 (Sindh) 98; Ahmad Sharif v. Mirza Beg. 94 I. C. 779, 3 C. W. N. 460, 1926 (Oudh) 353; Bapurao v. Narayan, 103 I. C. 337, 1927 (Nag.) 321.

Madras High Courts he could not.¹ The controversy is now at rest by the authoritative pronouncement of the Supreme Court in *Bhagwati Pd. v. Chandramaul* AIR. 1966 S.C. 735 see page 94 ante. The Punjab and Madras High Courts gave a decree in a similar case even without finding that the defendant's possession was permissive, and only on finding that he had not proved adverse possession for 12 years.² But in all such cases, it is submitted, the necessary additional court-fee should be taken. In a suit for declaration that certain property belonged to A, having been allotted to him under a partition with his brother, B, the defendant, creditor of B, pleaded that it had been allotted to B. Both parties failed to prove their case and the court held the property to be joint. The Nagpur Court held that the relief could be given on this finding.³ Where the question of adverse possession was not raised in the written statement but was urged without objection by the plaintiff in the trial court as well as in Appellate Court, no objection to the determination of that question could be taken in second appeal.⁴ But this cannot always be allowed, specially when the plaintiff cannot get full relief against the defendant and has to implead a new defendant.⁵ Where a suit was brought under Section 68 (c), Transfer of Property Act for mortgage money and it was found that there was an express provision for sale in the deed and the suit for sale could not otherwise be met on facts or law, it was held that it would be proper for the Court, even in second appeal, to avoid multiplicity of suits to grant a decree for sale under clause (a).⁶ In a suit against the Secretary of State for damages for breach of contract, the defence was denial that the plaintiff had any legal claim or right, and the absence of

¹ *Gobinda Kumar v. Mohini Mohan*, 33 C. W. N. 769, 1930 (Cal.) 24; *Chennaveraswamy v. Chinna*, 21 I. C. 560.

² *Kanshi v. Teja*, 100 I. C. 477 (Lah.); *Ramanuja Charyar v. Sundara*, 99 I. C. 312, 1927 (Mad.) 281.

³ *Behari Lal v. Gore Lal*, 1926 (Nag.) 203, 90 I. C. 263.

⁴ *Sharavan v. Fattu*, 98 I. C. 911, 29 Bom. L. R. 1357.

⁵ *Shib Ram v. Fakira*, 89 I. C. 103 (All.).

⁶ *Ramkumar v. Mahipal*, 1928 (All.) 188, 174 I. C. 292.

a valid contract as required by Section 30 (1) Government of India Act was not expressly pleaded, it was held that the latter plea could be allowed to be raised in appeal and could be made the basis of the decree.¹ In a suit for declaration of title based on a written conveyance, the writing was held to be inadmissible for want of registration and suit was therefore dismissed, though it was proved that plaintiff had paid the price and was in possession. The Lahore H. C. held that plaintiff should have amended his plaint by changing the cause of action from one based on an actual transfer of title to one based on part-performance under a personal contract but that the absence of this amendment was not fatal and that the plaintiff should get a decree for declaration that he was lawfully in possession of the property which was delivered to him and over which he had a lien for purchase money paid by him.²

In a money suit there was no averment in the plaint in what manner the suit was within time and how limitation was saved. However, one of the dates in the cause of action was the same as the date of acknowledgment. There was also an issue whether the suit was barred by limitation. The Patna High Court while rejecting the contention that the absence of a specific averment in the plaint that limitation was saved by acknowledgment, held that such an absence was a mere irregularity which caused no prejudice to the defendant.³

As a general rule a party to a suit can only succeed on the strength of his own case as made out expressly or impliedly in the pleading. He may also succeed on the basis of admission of his adversary but he cannot be allowed to take advantage of the weakness of the other party's case to his prejudice. No court has power to set up a new case for a party not involved in the pleadings,

¹ *Krishnaji v. Secretary of State*, 1937 (Bom.) 449.

² *Shankri v. Milka Singh*, 1941 (Lah.) 407.

³ *Vidya Nath Mandal v. The Coal Purchase Company*, A. I. R. 1971 Patna 229.

much less an inconsistent case. There must always be some foundation in the pleas in order to enable the court to grant a relief.¹ The S. C. in a later case, while affirming the above view also observed that a court cannot make out a case inconsistent with the claim or the defence.²

The court should, however, not set up an entirely new case which was never presented by the parties, nor should draw an inference inconsistent with the case set up by the parties,³ but the determination of the case should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made,⁴ and where a claim was never made in defence, it cannot be looked into even though there may be any amount of evidence on the record to support it.⁵ The rule applies to the appellate as well as to the trial court and it has been held that a conclusion of the appellate court which is based on nobody's pleading and on nobody's responsibility for any such pleading cannot be supported in second appeal,⁶ and where a plea of joint family status was not raised in the plaint but was entertained in appeal for the first time, the High Court interfered in second appeal.⁷ Where a suit for partition on the allegation that the parties were members of a joint Hindu family was dismissed on the ground that there had been separation, the appellate court refused to allow a decree on the basis of an agreement under which plaintiff was entit-

Court not
to set up
new case

¹ *Sriniwas v. Mahabir Prasad* A. I. R. 1951 S. C. 177.

² *Sheodhani Rai v. Suraj Prasad Rai* A. I. R. 1954 S. C. 758.

³ *Malaraju v. Venkatadri*, 59 I. C. 767, 19 A. L. J. 97, 33 C. L. J. 171, 40 M. L. J. 144, 23 Bom. L. R. 713 P. C. (See however, 33 C. L. J. 265); *Ramjiwan v. Mt. Maharani*, 1936 (Nag.) 295; *Arab Jhanglu v. Panjalshah*, 1938 (Sind.) 198; *Deo Narain v. Kamta*, 171 I. C. 174, 1937 (Nag.) 143; *Gopalsingh v. Sheokumar*, 169 I. C. 954, 1937 (Nag.) 85.

* See also Chap. XIV under heading "Court's power to grant different relief."

⁴ *Mylapore v. Yeo Kay*, 14 C. 801, 8 C. W. N. 865; *Ram Bilas v. Gopiram*, 1938 (Rang.) 205, 176 I. C. 469; *Madho Prasad v. Gouri Dutt*, 183 I. C. 179, 1939 (Pat.) 323.

⁵ *Ishar Fatima v. Anwar Fatima*, 182 I. C. 801 (2), 1939 (All.) 348.

⁶ *Joti Prasad v. Baru Singh*, 132 I. C. 426, 1931 (All.) 219.

⁷ *Gauri Shankar v. Thakur Mewa Ram*, 1931 All. 600, 131 I. C. 513.

led to a share.¹ In a case where the only issue was one of priority between a mortgage and a *takavi* advance, the court was held to be wrong in holding that the *takavi* had not been given for the benefit of the property.²—a point never raised by the parties. In another case, a zamindar sued for possession, alleging that W was his tenant who had lost his right as he had sold his holding. Defendant pleaded that W's father was the tenant, and as his other heirs were still tenants, the zamindar had no right of re-entry. The court found that W's father was the tenant but that by subsequent conduct on the part of the other heirs, W alone became entitled to the holding. It was held that the court was not entitled to set up this new case.³ Where the plaintiff sued for joint possession alleging that his cattle grazed on the land, and the court, finding the title not proved, gave a decree for grazing rights, it was held that such an inconsistent case could not be established.⁴ Similarly, a finding that the plaintiff was an occupancy tenant in a suit in which he pleaded that he was a subordinate tenure-holder was not held good.⁵ In suit for declaration of a customary right of taking out a procession with music, decree was not given on the basis of common law right of a citizen when the plaintiff failed to prove customary right.⁶ If a similar claim is based on easement, decree cannot be given on the ground of customary right.⁷ Where in a suit for demolition of defendant's wall built in front of plaintiff's door, the plaintiff could not prove his easement of way through that door, the court was held not entitled to declare that the plaintiff could open another door as easement of necessity.⁸ On a suit for possession of a *takia*, well and mosque on the ground of

¹ Narayanamurti v. Satyanrayna, 168 I. C. 98, 1937 (Mad.) 122.

² Munshi Babu Ram v. Babu Ram, 60 I. C. 620, 9 O. L. J. 343.

³ Joad Ali v. Srimati Rai Kishori, 85 I. C. 753 (Cal.)

⁴ Mahmud Shah v. Fatha, 54 I. C. 43 (Lah.)

⁵ Badr-ud-din v. Herajatulla, 54 I. C. 797 (Cal.)

⁶ Muchumarri v. Yerravulu, 94 I. C. 226. (Mad.)

⁷ Baldeo Bind v. Sheikh Abdul Aaiz, 1948 Pat. 425.

⁸ Laldin v. Abdul Gani, 8 L. L. J. 547, 27 P. L. R. 771, 99 I. C. 922, 1927 (Lah.) 36.

ownership being dismissed, plaintiff was not allowed to plead in appeal that the property was *waqf* and that he was the *Mutwalli*,¹ nor was a plaintiff who sued as a *Mutwalli* for possession of a mosque property wrongfully alienated, allowed a decree on the ground that he was a worshipper, on failure to prove that he was a *Mutwalli*.² Where in a case under S. 3 Charitable and Religious Trusts Act, the applicant alleged that a certain *Math* was a public endowment and a certain temple situate within its precincts was a public temple and non-applicants did not dispute these facts, the court was not competent to hold on the evidence of some witnesses that the temple was under the control and management of the Mahant of the *Math*.³ In a Punjab case, the plaintiff claimed as donee from the owner or by adverse possession, and the court found that he was donee from the widow of the owner's son, who had herself taken possession without title, it was held that the plaintiff could not rely on adverse possession of the widow followed by his own adverse possession.⁴ In a suit for possession on the basis of title derived by purchase the purchase was not proved, it was held that the court could not give a decree on the basis that plaintiff was a *benamidar* for his vendors.⁵ Where in a suit for dower on the ground of contract, the contract was not proved, a decree was not given even for customary dower.⁶ Similarly in a suit for rent a decree for damages for use and occupation cannot be granted⁷ though it was observed in one case that in a proper case when the omission to claim such damages was by mistake or inadvertence, plaintiff may be allowed to amend his plaint so as to

¹ Sharaf Din *v.* Mokham, 33 I. C. 748; Pitam *v.* Kallu, 42 P. L. R. 94.

² Debendranath *v.* Shefatulla, 99 I. C. 205, 44 C. L. J. 339.

³ Ram Kishorelal *v.* Kamalnarain, 1947 Nag. 87.

⁴ Jhando Mal *v.* Gopal Das, 1925 (Lah.) 571.

⁵ Bhusan *v.* Majumdar, 1940 (Cal.) 148.

⁶ Bhuri *v.* Asghari, 94 I. C. 959 (Lah), *contra* Mahbubani *v.* Mohd., 8 Pat. 645, 117 I. C. 207, 1927 (Pat.) 207.

⁷ Bachu *v.* Mahomed Umroo, 1940 (Pat.) 555, 190 I. C. 733; Kirpa Shankar *v.* Janki Prasad, 1942 (Fat.) 86.

claim such damages.¹ Where an estoppel was pleaded on the basis of a compromise, the court could not find an estoppel on the basis of another compromise.² Where defendant did not plead wager, held that it was not proper for the court to base its Judgment on any such hypothesis.³ In a suit against Government although the allegation of due service of notice under S. 80, C. P. C. not having been denied the defendant was held not to be entitled to adduce evidence to show that proper notice was not served, yet it was held that if the notice produced by the plaintiff himself showed that it was not in conformity with the requirements of S. 80, the court was bound to take notice of the defect and refuse to entertain the suit on the ground that the mandatory provisions of law had not been complied with.⁴ This case proceeded on the ground that notice under S. 80 cannot be waived; but some of the High Courts, have held that it can be waived⁵ and therefore disallowed a plea of want of notice taken at a very late stage.⁶ In a suit brought to contest the right of Government to assess rent for certain alluvial lands which the plaintiff had let out to his tenants, the plaintiff claimed ownership on the ground that the land was an accretion to his property, but it was held that the land belonged to the Government and the plaintiff contended before the Privy Council for the first time that under Madras Act III of 1925, the person liable to assessment is the actual occupier and not the plaintiff. It was ruled that he could not be allowed to raise the plea at that stage of the case.⁷ Where plaintiff sued as a partner, which fact was found against him, he could not succeed on the ground that he had obtained the

¹ *Bachu v. Mahomed* (ibid.)

² *Shera v. Gahana*, 106 I. C. 474 (Lah.)

³ *Mukat v. Gulab*, 1931 A. L. J. 363, 1931 (All.) 229, 132 I. C. 422.

⁴ *The Governor-General in Council v. Amilal*, 1947 Pat. 81, 250 I. C. 274.

⁵ 22 Mad. 538, 25 Mad. 307, 1949 Mad. 747 *Union of India v. Tej Narain*, 1957 M. B. 108; *Ramcharan Mahto v. Custodian*, 1964 Pat. 275; *Hiranand Himmatlal v. Kashinath Thakurji*, 1942 Bom. 339.

⁶ *Wasaint Shripat v. G. M. Khandekor*, 1949 Nag. 25.

⁷ *Pushvati v. Secretary of State*, 1926 (P. C.) 18.

right of a partner by assignment.¹ In a suit by commission agent against M. P. State and the principal for price of the goods seized by the Government the agent did not claim lien over the goods in the plaint. It was claimed in arguments in Supreme Court but the argument was not accepted as it amounted to variance between pleading and proof.² Where the plaintiff brought a suit for account against the defendant as agent in respect of a partnership transaction the court was held incompetent to give a decree for account of partnership on the finding that the plaintiff and defendant were partners.³ Similarly, in a suit for dissolution of partnership a decree for partition was not passed.⁴ A plaintiff brought a suit for challenging a widow's transfer on the allegation that he was the next reversioner. It was found that there was a nearer reversioner. The plaintiff was not allowed to rely on the latter's alleged refusal to sue,⁵ or on his collusion with the widow.⁶ A plaintiff alleged a particular custom, he was not allowed to prove another custom.⁷ In a suit to set aside a decree on the ground of guardian's fraud and collusion, the court was held incompetent to consider the guardian's negligence, when fraud and collusion were not proved.⁸ When a wife brought a suit for maintenance on the ground of her chastity and her husband's misconduct and both were disproved, she was not allowed to fall back on a plea of infidelity and subsequent reformation which was neither advanced nor supported by evidence.⁹ Where a plaintiff admitted that a certain deed was merely an agreement for sale and set up a subsequent oral sale, held that it was not open to

¹ *San Kauk v. Maung Po*, 101 I. C. 367, 5 Bur. L. J. 233.

² *Ram Prasad v. The State of M. P.* A. I. R. 1970 S. C. 1818.

³ *Krishnaswami v. Jayalakshmi*, 54 M. 671, 31 M. W. N. 497, 130 I. C. 766, 60 M. L. J. 315, 1931 (Mad.) 300.

⁴ *Tajammul Husain v. Ahmad Ali*, 167 I. C. 839, 1937 (Oudh) 438.

⁵ *Sitasaran v. Jagat*, 102 I. C. 296 (All.)

⁶ *Bigan Kuer v. Radha*, 1950 (Pat.) 585, 190 I. C. 196.

⁷ *Mohammad Mashooq Ali v. Harun-nissa*, 114 I. C. 113, 1926 (Oudh) 204.

⁸ *Bhaglu v. Ram Autar*, 104 I. C. 178, 1936 (Pat.) 442.

⁹ *Jeeva Ammal v. Ranganatha*, 50 L. W. 200, 1939 (Mad.) 788.

the court to hold contrary to the pleadings that the deed was a complete sale.¹ Court cannot make out a new case for a party.²

Where a suit was brought on a *bundi*, decree cannot be passed on the debt,³ nor can a suit fought in two courts on the basis of a promissory note be remanded in second appeal to see whether the plaintiff succeeded in proving the original debt.⁴ A plaintiff setting up an easement cannot in second appeal set up a grant or custom as the basis of his claim.⁵ A dispute between the plaintiff and his brother's widow in mutation proceedings was settled by an agreement that the widow should take $\frac{1}{4}$ th share. Afterwards the plaintiff sued the widow for recovery of possession of the $\frac{1}{4}$ th share on the ground of title, ignoring the agreement. The lower court maintained the agreement and dismissed the suit. The plaintiff was not allowed to argue in appeal that under the agreement itself the widow had only a life interest.⁶ In a suit for enhancement of rent the plaintiff alleged a customary rate but failed to prove it. He was not allowed to ask the court to determine a fair rent.⁷ In a suit for possession on the ground that defendant was plaintiff's tenant, the defendant claimed title and both parties adduced evidence of title and the court found that the title was in the plaintiff but did not find the tenancy proved, it was held that the suit could be decreed on the ground of title.⁸ In a case plaintiff sued for recovery of deposit alleging several previous demands without specifying any dates and a final demand within three years of suit but defendant denied the deposit and also all demands. On the plaintiff's witness stating in cross-examination that a demand was made more

¹ *Jiwan Mal v. Allah Jawaya*, 1931 Lah. 595, 133 I. C. 646.

² *Sheodhari v. Suraj Prasad*, 1954 S. C. 758.

³ *Chhotey Lal v. Girraj Kishore*, 93 I. C. 63 (All.)

⁴ *Mst. Thakurain v. Tota Ram*, 1926 (Oudh) 40.

⁵ *Ganpat v. Lalman*, 100 I. C. 21 (Nag.)

⁶ *Ram Charan v. Mst. Sarataji*, 1926 (Oudh) 22, 90 I. C. 766.

⁷ *Satindara v. Bawa Sundari*, 1926 (Cal). 432, 88 I. C. 512.

⁸ *Ponniah Pilai v. Pannani*, 1947 Mad. 282, 1947 M. W. N. 22, 1947 M. L. J. 97.

than three years ago, the court dismissed the suit as time-barred. It was held that the court had no power to do so.¹

In a suit by the landlords the defendant's contention that there was only one landlord was upheld but the plaintiffs were not allowed to claim that decree be passed in favour of one landlord on the admission of the defendant. It was observed that the defendant had set up a different contract of tenancy and plaintiffs could succeed on admission only if liability was admitted without reservation.²

In a case the Oudh Chief Court took a more lenient and equitable view and held that if neither party discloses the entire truth and the evidence adduced discloses a set of facts midway or different from the case set up by either party, the court is obviously bound to take notice of true facts and to give effect to legal rights which arise on that state of facts. In that case, the plaintiff claimed a half share in a house alleging that it was joint property of his vendor and the defendant. The defendant's case was that the plaintiff's vendor had separated and lived in another house, that defendant's grandfather lived in the house in suit, and that when it fell down, defendant rebuilt it. The court found that the house had two portions, the front one occupied by defendant's grandfather and the back portion occupied by plaintiff's vendor, that the latter fell down and the plaintiff's vendor shifted to another village and defendant's grandfather built on the back portion more than 12 years ago. *Held*, that the suit could be dismissed on these facts.³ In a case where plaintiff failed to establish the mortgage of occupancy holding set up by him relief was granted on the basis of a different mortgage set up by the defendant.⁴ Where the illegality of a transaction was shown to the court, the Madras High Court refused to give relief on it even though the illegality was

¹ Puttu v. Vidya Ram, 1934 (All.) 10.

² Parekh Bros v. Kartick Chandra Saha A. I. R. 1968 Cal. 532.

³ Abdul Ghafoor v. Ram Sewak' 1925 (Oudh) 617.

⁴ Shri Ram v. Thakur Dhan Bahadur Singh A. I. R. 1965 All. 223.

not pleaded,¹ or the objection was taken at a very late stage.² Similarly, where illegality appeared from plaintiff's own admission, it was held that the court was bound to take notice of it.³ But in a suit for royalty at increased rate which was payable only in a certain contingency, defendant who had made payments at that rate for some time but who denied his liability to increased rate and claimed that the over payments should be set off against the money really due, was not allowed to set up the nature of the mistake under which the payment was made as he had not specifically pleaded that the payment was made under a "mistake of fact."⁴ It has been held by Nagpur High Court that if there is any question of statutory requirement which compels the doing of a thing the courts must take note of that fact even though not pleaded.⁵ In another case, the Madras High Court held that if the facts found by court give rise to a particular situation in which the law provides that certain consequences should follow, the court should apply the law though the parties did not specifically raise the plea. In that case in a suit against three persons on a pronote one defendant denied execution but the other two admitted it, setting up other defence, and the court found the signature of the former to have been forged, it was held that the whole pronote became void under Section 87, Negotiable Instruments Act, and no decree should be given even against the other two defendants.⁶ In a case where the plaintiff had put in the plaint all the facts on which he based his claim without deducing the legal position properly from those facts and thus based his suit on a wrong cause of action, it was held that it was for the court to apply the correct legal principles and give the plaintiff that which is due to him.⁷

¹ *Lakshmiyya v. Murahari*, 1930 (Mad.) 547.

² *Abdulla v. Guruappa*, 1944 (Mad.) 387.

³ *Alice Mary Hill v. Clarke*, 27 A. 266, 1 A. L. J. 632; *Mulchand v. Khem Chand*, 118 I. C. 202. (Sind).

⁴ *Shiva Prasad v. Maharaja*, 1943 (Pat.) 327.

⁵ *Radha Kisan v. Jamna Das & Co.* I. L. (1941) Nag. 702.

⁶ *Rangayya v. Sundaramurthy*, 1943 (Mad.) 511.

⁷ *Adhilakshmi v. T. Nallaswin*, 1944 (Mad.) 530.

In an English case, although the plaintiff had filed the suit on a plea of negligence and had failed to establish negligence, yet it was held that the Court could give relief on the ground that defendants were guilty of trespass when that clearly appeared from the facts alleged by the plaintiff (as it was observed that the plaintiff was not bound to state the legal effect of the facts on which he relied) and when the defendants had not suffered an injustice in the way of being shut out from giving evidence. The action was treated as one of trespass.¹

In another case, when one party pleaded separation and the other jointness, the court held that there was a reunion after separation.²

In another case, a plaintiff sued for recovery of Rs. 500 said to have been advanced on a receipt, but it was proved that there was no cash advance and defendant had promised to pay the plaintiff Rs. 500 if the plaintiff did not bid at an auction sale and the plaintiff kept to his agreement, the Nagpur High Court held that as the agreement was lawful, plaintiff should get a decree.³ In a suit for specific performance and recovery of earnest money as damages against the contracting party and his joint sons, the former died and the High Court passed a decree against the sons for the earnest money on plaintiff giving up his prayer for specific performance, merely on the finding that the father had received the money and in spite of the trial court holding that the contract was made without necessity. The Privy Council dismissed the suit, remarking that the character of the suit was not altered by giving up the prayer for specific performance, and refused leave to amend the suit into one for money had and received.⁴ In another case for specific performance and in the alternative for return of earnest money, where the contract was not proved but it was proved that the defendant had received

¹ *Konakier v. Goodman*, (1918) 1 K. B. 42 (cited with approval in *Ram Chandra v. Chinu*, 1944 (Bom.) 76.

² *Tukaram v. Govinda*, 95 I. C. 294, 1926 (Nag.) 385.

³ *Mahafazul Rahim v. Babulal*, 1949 Nag. 113.

⁴ *Ram Saran v. Mahabir*, 100 I. C. 56, 25 A. L. J. 74, 6 Pat. 323.

the money, it was held that the plaintiff was not entitled even to recover the same.¹

The various instances given above will show that if the substance is found in the pleadings, a case should not be thrown-out on a mere technicality provided no prejudice is done to the other party, and he has not been taken by surprise. Another yardstick is, whether the variance is material or immaterial. If it is the former, the court cannot grant any relief. If it is the latter, the court cannot refuse the appropriate relief.

As to the power of court to grant a relief different from that claimed *see* Chapter XIV.

Subsequent
events²

Ordinarily, the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon the court of justice to take notice of events which have happened since the institution of the suit to mould its decree according to the circumstances as they stand at the time the decree is made. Leave to amend may be granted under Or. 6, R. 17 for this purpose. (Mulla's C. P. C., 12th Ed., P. 612). Courts often take notice of such events and even of events occurring during the appellate stage and permit pleadings to be amended for including a prayer for relief on the basis of such events.³ This doctrine is, of an exceptional character and is applied to avoid multiplicity of proceedings or to do complete justice between the parties, or when the original relief claimed has, by reason of change in the circumstances, be-

¹ Bengal Coal Co. *v.* Prosanna Kumar, 45 C. L. J. 110, 134 I. C. 921.

² Refer also Ch. XVI. under heading Subsequent Events.

³ Sashi Bhusan *v.* Tulsi Charan, 4 D. L. R. (Cal.) 81.

come inappropriate.¹ Courts in India are not agreed as to whether this principle will apply even when the plaintiff's suit would be wholly displaced by the proposed amendment and a fresh suit by him would be barred by limitation. In cases where it would not be so barred different considerations might come into play.² Thus, if a suit for redemption is premature, the Madras High Court held that it cannot be decreed because the period of mortgage has expired during its pendency.³ But in Lahore, Patna and Peshawar a contrary view has been taken and the suits have been decreed.⁴ A suit for removal of trustee cannot be decreed according to the Calcutta High Court, on the ground of the latter's denial of the *debutter* nature of the property in the written statement.⁵ The Lahore High Court has taken a contrary view and held that a decree should be passed in such cases.⁶ In another suit, the Madras High Court has also passed a decree for a sum to which the plaintiff became entitled on the date of decree though he was not entitled to it on the date of suit,⁷ and where a suit to recover possession was filed a month before the lease term expired, it was held that the suit need not be dismissed as premature.⁸ Where a plaintiff in a declaratory suit acquired during the pendency of the suit the right to ask for some consequential relief, it was held that he was entitled to the declaration although it was open to him to ask for leave to amend the plaint and claim the consequential

¹ Banwarilal *v.* Shaikh, 1940 (Pat.) 204, 188 I. C. 337; Mandli Prasad *v.* Ram Charanlal, 1948 Nag. I; Meghaji *v.* Amount, 1948 Bom. 396, 50 Bom. L. R. 274.

² Zahur Din *v.* Jalal Din, 1944 (Lah.) 319.

³ Myla *v.* Basamma, 94 I. C. 639, 1926 (Mad.) 594.

⁴ Kuldep *v.* Md. Hashin, 1928 Pat. 396; Tulsiram *v.* Dinansah, 1926 Lah. 145; Ghulam Md. *v.* Rahmat, 1926 Pesh. 33.

⁵ Kali Kumar *v.* Ananda, 108 I. C. 589 (Cal.)

⁶ Kanshi Ram *v.* Jaimal, 75 I. C. 562 (Lah); Dera *v.* Basti, 1940 (Lah.) 194, 188 I. C. 616.

⁷ Vaddadi *v.* Daddi, 93 I. C. 955, 1926 (Mad.) 377, (1926) M.W.N. 9.

⁸ A. Suleman *v.* Abdus Shakur, 1950 (Nag.) 99; Sangeshar *v.* Asib Lal, 190 I. C. 675.

relief.¹ Similarly the same High Court refused relief to a party of the right which existed at the date of the suit when that right did not continue to exist but was lost before the relief could be granted. In that case a money decree holder who had attached a mortgaged property was impleaded by the mortgagee in his suit but was released by the court as unnecessary party. He filed a revision against this order, but before the hearing of the petition he purchased the property in execution of his decree and also in execution of the mortgage decree, and thus it remained no longer necessary to give him the relief he claimed in the revision, viz., that he should be impleaded in the mortgagee's suit.² In an Allahabad case one of the two lessors had brought a suit for his share of rent and the defendant pleaded that he had paid the whole rent to the co-lessor, it was held that the payment was collusive and, though plaintiff could not institute a suit for portion of the rent, yet his suit should be decreed on the ground that according to defendant's case the co-lessor's share of rent has been paid off.³ The Patna High Court has ruled that it is the duty of the Court to mould its decree so as to suit altered circumstances.⁴ But the same High Court refused to pass a decree in appeal in favour of a plaintiff whose claim to a share as his father's heir was negatived by the original Court but who became entitled to a share as heir to a defendant who died during the pendency of the appeal.⁵ In a case defendant's land was acquired under Land Acquisition Act and leased out to a Railway Co., but defendant did not leave possession and Government brought a suit for ejectment. The suit was dismissed as the Railway and not Government was held entitled to present possession. During the pendency of the appeal the management passed into the hands of the Government and the ap-

¹ Mammad *v.* Neerarayan, 1929 M. W. N. 165.

² Annamalai Chettiar *v.* Srinivasagva Iyengar, 1938 (Mad.) 293. 178 I. C. 595.

³ Joti Bhushan *v.* B. N. Sarkar, 1945 (All.) 311.

⁴ Ramchandra *v.* Mst. Bibi, 1945 (Pat.) 369.

⁵ Dulhan *v.* Bolkhandevi, 1945 (Pat.) 87.

pellate court held that court could take notice of this fact and give a decree for possession to the Government.¹

Where in a suit by a *de facto* shebait his competency to bring the suit was questioned, the court was allowed to take into consideration the facts of plaintiff having become *de jure* shebait during the pendency of the suit.² So, when one of the two mortgagees sued on the mortgage and the other died during the pendency of the suit, it was held that plaintiff should be given a decree, though on the date of the suit he was not entitled to one.³ It has been held in Sindh that in partition suits the rights of the parties should be finally settled having regard to events accruing up to the date of the decree.⁴

The court should, in any case, take into consideration such patent facts as a compromise between the parties.⁵ In England, in cases for dissolution of marriage, courts can take notice of grounds furnished during the pendency of proceedings provided a duly verified statement is furnished showing such grounds and petitioner's non-collusion and non-connivance.⁶ The Oudh Chief Court has held that it is incumbent on the Court to take notice of subsequent events and to mould its decree according to circumstances as they stand at the time the decree is made.⁷ The same view has been held in Sindh. In that case D, owner of a machinery, had hypothecated it to P, and afterwards sold it to M who had agreed to pay the money due to P. P sued for a declaration and injunction to protect his possession against interference by M, and claimed in the alternative his money which had not then become due but became due by the first hearing of the suit. The Court gave a decree for

¹ Tej Narain *v.* Governor General, 1947 (Pat.) 263.

² Sri Chandra *v.* Upendra, 54 C. L. J. 544.

³ Sarju Pd. *v.* Badri Pd. 1939 (Nag.) 242.

⁴ Mst. Ghulam *v.* Abdul Aziz, 1933 Sind 371.

⁵ Meyappa *v.* Seerthachi, 171 I. C. 145, 1937 (Mad.) 200.

⁶ Visla Duncan *v.* George Duncan, 184 I. C. 801, 1939 (Rang.) 352.

⁷ Bishwanath Singh *v.* Mujtaba Husain, 1941 (Oudh), 422, 195 I. C. 402.

the money as a matter of justice, though the right to call for the money had not accrued on the date of suit.¹

Keeping in view certain decisions of the Supreme Court, to be referred to hereinafter, the correct view seems to be that changes either in fact or in law which have supervened during the pendency of the suit must be taken into account if they affect the rights of the parties.

So far as the appellate Court is concerned, it is not only entitled but bound to take notice of events and changes in the legal position arising after the decision of the original court for doing justice between the parties. This is so because an appeal is, in this country, in the nature of a rehearing of the original case.² Where plaintiffs who had sued on a mortgage claiming to be heirs and representatives of the original mortgagee on the basis of a will executed by latter in their favour and the High Court dismissed their suit holding that the will had not been properly attested, applied for probate of the will and obtained it in their favour during the pendency of the Special Appeal in the Supreme Court, the probate was taken into consideration in the Supreme Court and on its basis the suit was decreed.³ In another case where a provision of law had been amended with retrospective effect during the pendency of the appeal, effect was given to the amended provision by the Supreme Court.⁴ So also where one notification which gave the plaintiffs a right to claim ejectment had been cancelled during the pendency of the litigation by another notification taking away that right, effect was given to the latter notification on the ground that the Court was bound to apply the law as it found it on the date of its judgment.⁵

¹ *Kimat Rai v. Mangha Ram*, 1943 (Sindh) 182.

² *per* Bhagwati, J. in *Chunilal Khushal Das v. H. K. Adhyarn*, 1956 S. C. 655 at pp. 673-74, 1956 S. C. J. 685 at 699; *Chandika Singh v. The Board of Revenue*, 1956 A. L. J. 883.

³ *Surinder Kumar*, 1957 S. C. 875.

⁴ *State of U. P. v. Raja Mohd. Saadat Ali Khan*, 1961 A. L. J. 79.

⁵ *Mohan Lal Chunilal v. Tribhovan Haribhai*, 1963 S. C. 358.

Also See *Indermall Lonia v. Subordinate Judge*, 1958 A.P. 779; *Amritlal N. Shah v. Alla Annapurnamma*, 1959 A. P. 9; *Har Prasad v. L. Sitaram*, 1958 All. 36.

CHAPTER IX

Revision and Amendment of Pleadings

When the pleading of a party is defective or incomplete his opponent's remedy is to apply—

Several
modes of
revision

(1) For particulars, or further particulars.¹ or

(2) For having the objectionable portion of the pleading struck out or amended,² or

(3) If the pleading is a plaint and is so defective that it does not disclose any cause of action, for having the same rejected.³

Even when no such application is made by the opposite party, the court has also power to pass any of the three orders specified above *suo motu*, or to require the party to file a written statement, or additional written statement, in case the former pleading is incomplete.⁴ It has also general power to have such amendments made as may be necessary for the purpose of determining the real questions in controversy between the parties.⁵

The amendment ordered by the court either *suo motu* or on application of the opposite party is what may be called *compulsory amendment*.

The party whose pleading is defective or incomplete may himself revise it :—

(1) By filing further particulars with the leave of the court, or,

(2) By filing a written statement, if a plaintiff, or an additional written statement, if a defendant, with similar leave of the court,⁶ or

¹ O. 6, R. 5, C. P. C.

² O. 6, R. 16, C. P. C.

³ O. 7, R. 11, C. P. C.

⁴ O. 8, R. 9, C. P. C.

⁵ O. 6, R. 17, C. P. C.

⁶ O. 8, R. 9, C. P. C.

- (3) By amending it with the leave of the court.¹
 (This is called *optional amendment*).

A.—Revision of opponent's pleading

Further
particulars

If a party does not state in his pleading full particulars of any material fact, as required by rules,² O. 6, R. 5, C. P. C. empowers a court to call for further and better particulars. The purpose of this rule obviously is :—

- (1) To do away with any ambiguity in the pleadings.
- (2) To exclude all irrelevant matter.
- (3) To pin down the parties to definite issues.
- (4) To give each party a chance to know what claim of his adversary he has exactly to meet.
- (5) To avoid multiplicity of suits.

It is the function of every court to get all the defects in the pleadings removed in order to ensure a fair trial without any prejudice to any party opposing each other in a suit. This might be done *suo motu* or on the application of the opposite party. Such applications are, at present, very rarely made in the Mofussil, but regard being had to the importance of particulars, they should be encouraged in all proper cases. An application should be made for particulars whenever a pleading is worded so vaguely that the opposite party cannot be sure what his opponent's line of attack or defence will be at the trial. Though such applications can be made at any time³ yet, as a general rule, they should be made with reasonable promptitude⁴ and, if the applicant is a defendant, he should ordinarily make the application before putting in his defence,⁵ though he does not waive his right to call for particulars by merely putting in his defence.⁶ But if the plaintiff does not take objection that the defendant's

¹ O. 6, R. 17, C. P. C.

² See Chap. VI *ante* and O. 6, R. 4, C. P. C.

³ Thomson *v.* Birkely, 46 L. T. 700.

⁴ Gourad *v.* Fitz Gerald, 37 W. R. 265.

⁵ Blackie *v.* Osmaston, 28 Ch. D. 119.

⁶ Sachs *v.* Speilman, 37 Ch. D. 295.

pleading is not precise and takes no steps against it, he cannot make any grievance at the close of the case.¹ The court may either order particulars to be filed before the defendant files his defence, or, if the court thinks fit, it may order the defence to be filed before the particulars. Where the question is whether there are any nearer reversioners of the deceased than a certain named person the court may require the defendant, before the plaintiff produces his evidence, to state whom he claims to be such nearer heirs.² Such an application cannot be made in an appellate court when the applicant did not do so in the trial court.³

Sometimes a party who is ordered to file particulars applies for discovery, and the question then arises whether he should be compelled to file particulars before discovery or whether discovery should be given before particulars are filed. The answer to this question depends on the circumstances of each case and the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts.⁴ Where the party pleading is unable to give the particulars without first obtaining discovery from his opponent, discovery may be ordered before particulars or where it is necessary for him to inspect the opponent's account books he may be allowed to do so.⁵ When a defendant knows the facts, and the plaintiff does not, the defendant should give discovery before the plaintiff delivers particulars.⁶ For example, in a suit by a principal against his agent employed to purchase grain, the former alleges that the agent had paid higher prices and secretly received commission from the vendors. The agent insists on particulars. The principal is entitled to inspection of the agent's books

Discovery
and parti-
culars

¹ *Sardar Dayal Singh v. Tulsidas*, 1945 (Bom.) 177.

² *Kanhaylal v. Mt. Champa*, 153 I. C. 545, 1935 (All.) 203.

³ *K. C. De v. Hira Bewa*, 167 I. C. 461, 1937 (Cal.) 51.

⁴ *Waynes Merthyr Co. v. Radford & Co.*, 1 Ch. 29.

⁵ *Rama Krishniah v. Satyanandan*, 55 M. 704, 62 M. L. J. 226. 1932 M. W. N. 93, 137 I. C. 636.

⁶ *Per Bowen, L. J. in Millar v. Harper*, 38 Ch. D. p. 112; *Edelston v. Russell*, 57, L. J. 927.

before he can be called upon to give particulars.¹ But in a libel case, when the defendant pleaded justification for the charge of “imposter” and a “charity swindler” made by him against the plaintiff, the court ordered him to deliver particulars and held that he was not entitled to discovery and inspection of the plaintiff’s account books, as “to apply this practice to the case of a libel would be to sanction the publication of a libel when the libellor knew no facts justifying the libellous statement.”² If an agent brings a suit against the representative of his deceased principal for recovery of money due to him on an account and the defendant pleads that he does not admit all the items alleged by the plaintiff, he cannot be compelled to state specifically which items he does not admit before he is allowed to inspect the plaintiff’s books, if he so desires.

When particulars not ordered

Particulars should not, however, be asked for in the following cases :—

(1) Where it would be oppressive or unreasonable to make such an order, as, where the information is not in the possession of either party or could only be obtained with great difficulty.³ In such cases, e. g., when the party sues or is sued in a representative capacity, an order is often made in England for “the best particulars the party can give.”

(2) Particulars can be given of an affirmative allegation and not of a mere denial. For example, where the plaintiff alleged that a committee did not act *bona fide*, fairly, or judicially in declining to re-elect him as a member, and the committee denied these allegations, it was held that the plaintiff was not entitled to particulars of the facts or grounds upon which the Committee based their decision.⁴ So, in a suit for malicious prosecution when the plaintiff alleged want of reasonable and probable cause and the defendant *merely denied* the allegation the defendant was not ordered to give

¹ Whyte v. Ahrens, 26 Ch. D. 717.

² Zierenberg and Wife v. Labouchere, (1893) 2 Q. B. 183.

³ Bullen and Leake’s *Precedents of Pleadings* 11th. Ed., p. 58.

⁴ Weinberger v. Inglis, (1918) 1 Ch. 133.

particulars of his reasonable and probable cause.¹ If the defendant had *affirmatively* alleged a reasonable and probable cause for the prosecution, he could be ordered to give particulars.²

(3) Particulars cannot be asked of an allegation which is immaterial.³

(4) Particulars cannot be ordered of facts which are not material facts but which are merely evidence of material facts.

(5) When plaintiff sues for account to be taken of the money due to him, no particulars can be ordered from him.⁴

Every party required to furnish further and better statement of the nature of his claim or defence or to furnish further and better particulars has a right to file objections. If he succeeds in showing that it is a matter in which further statement or particulars should not be asked for on any one or more of the above grounds or that it would not be in the interest, of the fair trial of the dispute, or that the particulars could not be supplied without laborious inquiries or unnecessary expense, the court may after hearing the parties, reject the prayer for further particulars or revise its own orders if necessary or pass such orders as may be considered appropriate.

But, it is no objection to an application for particulars that the applicant must know the true facts better than his opponent, for he is entitled to know the outline of the case that his adversary will try to make out against him, which may be something different from the true facts. Nor is it a valid objection that if the order is made, it will compel the party giving the particulars to name his witnesses.

O. 6, R. 5, provides that a court is entitled to make the order for particulars "upon such terms, as to cost and other-

Terms on which ordered

¹ Roberts *v.* Owen, 6 T. L. R. 172.

² Mure *v.* Keye, 4 Taunt 34.

³ Cave *v.* Torr, 54 L. T. 515; Gibbons *v.* Norman, 2 T. L. R. 676.

⁴ Blackie *v.* Osmaston, 28 Ch. D. 119.

wise as may be just.” Any reasonable terms can be imposed. An order may be made that if particulars are not delivered, the suit shall be dismissed,¹ or that the vague allegations will be struck out and the party making them shall not be allowed to give evidence in support thereof. Order to pay a certain sum as costs as a condition precedent of filing the further particulars may, and in fact in the majority of cases should, be made. If this order is disobeyed, the suit may be dismissed if the plaintiff is in default, and the defence may be struck out if the defendant is in default.² Where, however, the fact of which particulars are ordered is not the sole fact constituting the cause of action for a suit or constituting the defence, the whole suit need not be dismissed and the whole defence need not be struck out. In such cases it would be fair to order the striking out of the allegation of such fact from the pleading, and if, after striking it out, there still remain other facts on which the case can be tried, it should be tried. The Madras High Court has held that even if no conditions are imposed in the order for delivery of further particulars under O. 6, R. 5, C. P. C. the court may direct that the defence be struck out for defendant’s failure to comply with the order.³ In this case the aid of O. 6, R. 16, was invoked.

Striking
out or
amending
opponent’s
pleadings

Ordinarily the court is not to dictate to parties how they should frame their pleas, and this rule has a sort of sanctity attached to it. But as pointed out by Bowen, L. J., this rule is “subject to this modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right.”⁴ His opponent

¹ *Davey v. Bentinck*, 1 Q. B. 185; *Gajadhar v. Gokuldas*, 1940 (Nag.) 261, 190 I. C. 719.

² *Gauri Shanker v. Manki*, 21 A. L. J. 571, 45 A. 624, 74 I. C. 466, 1924 (All.) 17.

³ *The Nedungadi Bank v. Official Assignee*, 1930 (Mad.) 473.

⁴ *Knowles v. Roberts*, 38 Ch. D. at p. 270.

may, in such cases, apply that the pleading be struck out or amended, though very often it would be better to leave it alone than to reform or improve the opponent's pleading. It is for the pleader to decide whether any useful purpose will be served by making the application. If he thinks it is worth while to make such an application he should do so under O. 6, R. 16, C. P. C. Where a plaint was verbose, extremely loose, involved and unintelligible, and did not give particulars of the contract (breach of which was alleged) nor of the special damages claimed nor any dates, it was held that the plaint ought to have been struck off under O. 6, R. 16, or an order for its amendment should have been made so that an intelligible case could have been presented and the defendant put in a position to know what case he had to meet.¹

Though such an application may be made "at any stage of the proceeding," yet it should generally be made with reasonable promptitude, as the court has discretion to reject it if made at a very late stage.²

The matter which can, under this rule, be ordered to be struck out or amended, is that which is "unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit." But the court will exercise this power with great care and discrimination. If the decision depends on the question of admissibility of evidence to prove facts involved in the objectionable plea, such latter question should not be determined in a proceeding on the application under O. 6, R. 16.³

The rule is an exact reproduction of the English O. 19, R. 27, and under that rule it has been held in England that the mere fact that a pleading contains unnecessary matter is no ground for striking out those matters.⁴ unless they

Unneces-
sary mat-
ters

¹ *Banerjea v. Manzar Ali*, 114 I. C. 906, 27 A. L. J. 496.

² *Cross v. Howe*, 62 L. J. Ch. 342; *New Fleming Spinning and Weaving Co. v. Kessowji*, 9 B. 373.

³ *Anderson v. Walter Mitchel*, 88 I. C. 434, 29 C. W. N. 670, 1925 (Cal.) 460.

⁴ *Rock v. Pursell*, 84 L. T. J. O. 45.

are scandalous or tend to prejudice or embarrass or delay the fair trial of the suit. This interpretation is, however, against the plain words of the rule under which a matter can be struck out merely on the ground that it is unnecessary, though as a matter of practice no one will take the trouble of applying for striking out a matter which, though unnecessary, is yet otherwise perfectly harmless.

Scandalous
matters

“Scandal is calculated to do great and permanent injury to all persons whom it affects, by making the records of the court the means of perpetuating libellous and malignant slanders, and the court, in aid of the public morals, is bound to interfere to suppress such indecencies which may stain the reputation and wound the feelings of the parties and their relations and friends.”¹ An allegation containing imputations against the opponent or charging him with bad faith or misconduct is of a scandalous nature,² and so is a statement containing indecent or offensive matter.³ It will be struck out, by the Court itself if the party declines to do so⁴ and not merely amended so as to make the allegations less scandalous. For instance, where a party alleged that the suit had been brought at the instance of plaintiff’s son who was an *awara*, and the court simply allowed the word to be changed into *awara gard*, it was held that the word should have been entirely struck out.⁵ The words ‘awara’, ‘chalaak’ and ‘qamarbaz’ were held scandalous and irrelevant when used in written statement and were ordered to be expunged. But,⁶ however, grave the imputation may be, it will not be struck out if it is relevant to any issue in the case.⁷ e. g., in an heir’s suit to set aside a will on the ground of undue influence of

¹ Story’s Equity Pleadings, 10th Ed, Sec. 270.

² *Lumb v. Beaumont*, 49 L. T. 772; *Brooking v. Maudslay*, 55 L. T. 34; *Murray v. Spon Local Board*, 1 Ch. D. 35.

³ *Christie v. Christie*, L. R. 8 Ch. 499.

⁴ *Sheonarain Jafa v. Sri Gupta*, 1961 A. L. J. 52 (S. B.).

⁵ *Sumat Prasad v. Ram Sarup*, 1946 (All.) 204.

⁶ *Jagannath Parsad v. Ramchandra*, 1952 All. 408.

⁷ *Millington v. Loring*, 6 Q. B. D. 190; *Appelby v. Franklin*, 17 Q. B. D. 93.

the legatee on the testator, the allegation that she (i. e. the legatee) had immoral connection with the testator at the time, though scandalous, will not be struck out, because it is relevant.

To determine whether an allegation is necessary one has to see whether it is necessary for the formulation of the plaintiff's case or defendant's defence or relevant for the purpose of the decision of any issue. The test for this would be whether the allegation could form part of the evidence which the party making it would be bound to lead for the purpose of obtaining the relief asked for by him.¹

In considering the question whether a matter tends to "prejudice, embarrass or delay the fair trial of the suit," liberal interpretation should be given to the words "trial of the suit," and any matter which embarrasses a party not exactly at the trial but at any stage of the proceeding, e. g., in drawing up his defence, would be equally embarrassing.² A pleading is embarrassing if it is ambiguous or unintelligible³ as a plea of justification in a libel suit leaving it doubtful how much of the libel the defendant intends to justify, or if it is too vague,⁴ or too general⁵ so as not clearly to indicate what case the opposite party has to meet at the trial, or when full particulars are not given which are necessary.⁶ But pleading is not embarrassing merely because it is prolix,⁷ or because it contains allegations which are inconsistent or stated in the alternative.⁸ In a suit for possession, the defendant denied the genuineness of a deed of *waqf* and, in the alternative, pleaded that the deed had been

Embarrassing matter

¹ P. W. Shamdasni v. Central Bank, 1944 (Bom.) 198.

² Berdan v. Greenwood, 3 Ex. D. 251.

³ Fleming v. Dollar, 23 Q. B. D. 388.

⁴ Byrd v. Nunn, 7 Ch. D. 284.

⁵ British Land Association v. Foster, 4 L. T. 574.

⁶ The Nedimgadi Bank v. Official Assignee, 1930 (Mad.) 473.

⁷ Heap v. Marris, 2 Q. B. D. 630.

⁸ Child v. Stenning, 5 Ch. D. 695; Motilal v. Judhistir, 22 C. I. J. 254, 31 I. C. 181, 20 C. W. N. 310; Official Assignee v. Bidya, 24 C. W. N. 154, 45 I. C. 700, 30 C. L. J. 423.

obtained from her by fraud and undue influence, it was held, that there was nothing to embarrass, delay or prejudice the fair trial.¹ How far alternative and inconsistent pleadings are allowed and in what cases they are not allowed has already been dealt with in the preceding chapter. A plaint in which there is an improper misjoinder of causes of action e. g., in contravention of O. 2, R. 5, C. P. C. or of causes of action and parties, may be embarrassing.

In England, an application to strike out scandalous matters can be made not only by a party to the action, but even by a third person who is affected by the scandalous matter.²

It will thus appear from the language used in O. 6 R. 16 C. P. C. as well as the reported cases, that the power conferred upon the court by this rule is discretionary. The court may order partial amendment of the pleading by striking out the objectionable portion, or strike out the whole pleading, or give leave to amend.

Application
for rejection
of
plaint

If a plaint does not disclose a cause of action, e. g., if it omits allegation of a material fact which is essential to give the plaintiff the relief which he seeks, it is not necessary for the defendant to file a defence on the merits but the defendant may make an application that the plaint should be rejected under O. 7, R. 11, C. P. C. For instance, in a suit by an anomalous mortgagee for realisation of the mortgage money by sale of the mortgaged property, if the plaint does not show that a power to realise the mortgage money by sale was specifically given to the plaintiff under the mortgage deed, it does not disclose a cause of action and can be rejected. The court is bound to pass an order of rejection at any stage of the suit when the defect is brought to its notice, even after the plaint has been registered.³ In some earlier Calcutta and Madras cases it was held that a plaint

¹ *Farid-un-nissa v. Mukhtar*, 40 I. C. 448, 4 P. L. J. 230.

² *Cracknell v. Janson*, 11 Ch. D. 1.

³ *Kishor v. Sabdal*, 12 A. 553; *Venkatesha v. Ramasami*, 18 M. 338; *Pudmanand v. Anant Lal*, 34 C. 20.

could not be rejected after its registration,¹ but the suit could, at any rate, be dismissed on this ground. The Calcutta High Court has in a later case held a contrary view.² But a plaint must be rejected as a whole, it cannot be rejected in respect of a part of the claim.³

The court can, of course, permit the plaintiff to amend the plaint if a cause of action does really exist but has not been sufficiently disclosed, or can pass any other equitable order.⁴

B—Revision of one's own pleading

When a party, who has in the original pleading, or in compliance with an order of the court, given all particulars then within his knowledge, subsequently discovers some new matter which he desires to add to the particulars already given, he should obtain leave to deliver further particulars. For, without such leave, he has no right to deliver further particulars,⁵ and unless he delivers such particulars, he will not be entitled to give evidence of the new facts and his evidence shall be confined to the particulars already given. Such an application will generally be allowed, where the addition of particulars will cause no injury to the opposite party, except such as can be compensated by costs,⁶ but it shall not be allowed if it is sought thereby to introduce a new cause of action, e. g., to raise a charge of fraud for the first time,⁷ or to increase the amount claimed after the defendant has paid into court the full amount originally claimed. Such application, if made at the time of trial is, as a rule, refused.⁸

(1) By filing further particulars

¹ *Habibul v. Md. Raza*, 8 C. 192; *Valiya v. Suppanair*, 2 M. 308; *Bhawani v. Zahur*, 29 I. C. 410 (Board of Revenue, U. P.)

² *Kiranchandra v. Puranchandra*, 40 C. W. N. 1590.

³ *Maqsd Ahmad v. Mathra Datt & Co.*, 1936 (Lah.) 1021.

⁴ *Mahomed Fateh Nasib v. Saradindu*, 162 I. C. 689, 1936 (Cal.) 221.

⁵ *Yorkshire Provident Co. v. Gilbert*, 2 Q. B. 148, 64 L. J. Q. B. 578; *Emden v. Burms*, 10 T. I. R. 400.

⁶ *Clarapede v. Commercial Union Association* 52 W. R. 262.

⁷ *Cocksedge v. Metrop. Coal Association*, 65 L. J. 432; *Hendricks v. Montagu*, 17 Ch. D. 638.

⁸ *Saunders v. Hamilton*, 96 L. J. 679.

(2) By filing additional pleading

A party may file an additional pleading in the shape of a written statement, if plaintiff, or an additional written statement, if defendant, when the original pleading is incomplete. But this, too, can be done only with the leave of the court, and not otherwise.¹ A minor, on attaining majority during the pendency of the suit, can, with the leave of the court file another written statement or amend the written statement filed by his guardian ad litem previously.² If a defendant makes certain new allegations in the written statement and the plaintiff wants to reply to them, he can obtain leave to file a written reply, except that when he wishes to plead to the defendant's claim for a set off, he can do so as of right and no leave of the court is necessary.³ Similarly if the defendant has, by mistake, omitted to state any important fact in his written statement, he can obtain leave to file an additional written statement, but no additional written statement can be filed after the plaintiff's case has been closed,⁴ or after the parties have entered upon their cases at the hearing,⁵ or so as entirely to change the defence set up in the original written statement.⁶

Departure

No subsequent pleading should raise any new ground of claim or defence or contain any allegation of fact inconsistent with the previous pleading.⁷ In other words, what is technically known as a "departure" in pleading is not allowed. For instance, when a person sued for a half share in a property on the allegation that the defendant had purchased it for himself as well as the plaintiff, and the defendant pleaded that he had purchased for himself alone, the plaintiff's allegation in the rejoinder to the defendant's written statement to the effect that though the defendant purchased

¹ *Moss v. Maligns*, 33 Ch. D. 603.

² *Ramkhelawan Singh v. Ganga Prasad*, 1937 Pat. 625, 172 I. C. 513; *Shiva Kumar Singh v. Kari Singh*, 1962 Pat. 159, (1957) 2 M. L. J. 164.

³ O. 8, R. 9, C. P. C.

⁴ *Venkataswami v. Uppilpalayam*, 153 I. C. 453, 1935 (Mad.) 117.

⁵ *Haji Saboo v. Ayeshabai*, 27 B. 485 P. C., 30 I. A. 127.

⁶ *Douglas v. Collector of Benares*, 5 M. I. A. 271 (290).

⁷ *Munchershaw v. New Dhuru sey S & W. Co.*, 4 B. 576.

for himself he had subsequently agreed to sell a half share to the plaintiff was ignored by the court and the case was tried on the only issue whether the purchase was made by the defendant for himself or for himself and the plaintiff.¹ Similarly, when a plaintiff claimed a decree as owner alleging that the decree holder was her *benamidar*, her allegation in the replication that she had a charge on the decree was ignored and was not put in issue.² Both in O. 6, R. 7, as well as in the corresponding English rule (O. 19, R. 16), it is laid down that no pleading shall raise any new "ground of claim," but the word "claim" seems to have been used in a much wider sense here so as to include the claim of the defendant also, though it would have been better to have said "new ground of claim or defence." Therefore this rule prohibits the raising of a new plea in defence as well as a new ground of claim, as there is no justification for making any distinction between the pleading of a plaintiff and that of a defendant in this respect. In England the rule has been freely applied to defendant's pleading also.³

If a party intends to set up a new ground of claim or a new plea or to allege a fact inconsistent with his previous pleading, his proper course is to apply for leave to amend his original pleading⁴ and not to apply for leave to deliver an additional pleading nor can he set up new grounds in the guise of further particulars⁵ or in a rejoinder.⁶ The practice which prevails in some mufassil districts of filing an additional written statement whenever a new plea is intended to be added is therefore against O. 6, R. 7, and is wrong.

The third and the most important way in which a plaintiff or defendant can revise his pleading is by amending it. This is sometimes necessitated by fresh information, may

(3) By amendment

¹ O. 6, R. 7.

² Govind Singh *v.* Mungaji, 57 I. C. 684 (Nag.).

³ Roberts *v.* Mariett (1871), 2 Wms. Saunds, 188; Culter *v.* Southern 1 Wms. Saunds, 116; Fulmerston *v.* Steward, 101 Plowd, 101.

⁴ Hardial Singh *v.* Sardarni Jaswant Kr., 1943 (Lah.) 159.

⁵ Mehnga Das *v.* Maya Singh, 1937 (Lah.) 795.

⁶ Vishwapati *v.* Venkat Krishna A. I. R. 1963 A. P. 9.

be (i) by replies to interrogatories served on the opponent, (ii) by discovery and inspection, (iii) discovery of documents whose existence could not be previously known by exercise of due diligence and (iv) by the own pleas of his adversary. All or any one of these factors may require reshaping of the claim or defence with the resultant prayers for voluntary amendment. The amendment, however, should be applied for and sought at the earliest opportunity.

The subject of voluntary amendment of pleading, as distinguished from compulsory amendment made under the order of the court, which has already been discussed, is of great importance and requires a rather detailed discussion which will be found in the next chapter.

CHAPTER X

(Voluntary) Amendment of Pleading

The provisions of the Code of Civil Procedure on the subject of voluntary amendment are contained in O. 6, R. 17, and have been borrowed, word for word, from the rule on the subject contained in the English Orders. They are in the following terms :

Statutory Provision

“The court may, at any stage of the proceeding, allow either party to alter or amend his pleading in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

Amendment is discretionary

It will be observed that while no party can, in any case, amend his pleading without the leave of the court, very wide and comprehensive powers have been given by this rule to the Court to allow any amendment which may be necessary, at whatever stage of the proceeding the application for amendment is made.¹ It must, however, be remembered that amendment can, in no case, be claimed as a matter of right but it is absolutely in the court's discretion,² which, of course, is a judicial discretion and cannot be exercised arbitrarily.³ It is open to correction, if necessary, by a court of appeal or revision in case it is exercised arbitrarily or perversely.⁴ It is the duty of the court (Appellate court) to correct erroneous interlocutory orders, though not appealed against as such, at the time of the hearing of appeal

¹ *Dronan v. Chundari*, 10 M. L. T. 116, 12 I. C. 119.

² *In re Joti Mahalinga*, 12 I. C. 104, 10 M. L. T. 1881; *Mukandi v. Jogesh*, 20 C. W. N. 1276, 35 I. C. 370, 1 Pat. L. J. 393; *Ghulam Haider v. Sardar Ali*, 73 I. C. 748; *Kastur Chand v. Maung Botha*, 11 I. C. 858, 4 Bur. L. T. 188.

³ *Tapi Ram v. Sadu*, 21 B. 570; *Satyees v. Monmohni*, 25 I. C. 567, 19 C. L. J. 518; *Kanda and others v. Waghur*, 1950 P. C. 68.

⁴ *Sheo Narain v. Ram Prasad*, 74 I. C. 317, 1923 (Nag.) 241.

against the order deciding the case.¹ But, ordinarily, an Appellate Court will not interfere with this discretion of the lower court, unless it is satisfied that the lower court has come to an absolutely wrong conclusion² or unless its exercise of power is shown to be wrong or perverse,³ or based on a wrong principle.⁴ There is some divergence of judicial opinion on the question whether an order refusing or allowing an amendment is open to revision, though it can certainly always be challenged in an appeal or revision from the final decree passed in the case. The Allahabad High Court holds that no revision lies from an order passed under Order 6, R. 17, C. P. C. allowing or disallowing amendments as in either case there is no case decided.⁵ Cases where the amendment comes under some other Order of the Code, for example, the addition or substitution of parties, or the striking of a pleading may amount to a case decided. Where an application is not for amendment of facts stated in the plaint but for elucidating array of parties by certain additions by way of explanatory notes, the rejection of the application is revisable.⁶ In a case the plaintiff sought permission to implead a party and to amend the relief. Trial court dismissed the application. It was held that the order was revisable as the amendment of the relief was logical corollary of the addition of the party.⁷ The Calcutta, Madras, Mysore, Andhra and Nagpur High Courts have held that an order allowing or refusing an amendment is open to revision.⁸ The

¹ *Seth Nanak Chand Shadiram v. Amin Chand Pyarelal* A. I. R. 1970 Cal. 8. See also *Satyadhyam Ghosal v. Smt. Deorajin Debi* A. I. R. 1960 S.C. 941.

² *Raja Ram v. Salig Ram*, 11 I. C. 481, 14 C. L. J. 188; *Imdad Ali v. Sayed Ali*, 40 I. C. 65, 26 P. R. 1917.

³ *Hari Krishna v. Dinar*, 29 I. C. 535 (Cal.).

⁴ *Badri Prasad v. Jagannath*, 101 I. C. 569 (Oudh.).

⁵ *Surajpali v. Arya Pritinidhi Sabha*, 1936 All. 626, 1936 A. L. J. 923; *Sitla Baksh v. Mahabir*, 1948 All. 221, 1948 A. L. J. 136.

⁶ *Jagdish Saran v. Bhagwat Saran*, 1940 All. 448.

⁷ *Shyamlal v. Bhukhan*, 1947 A. L. J. 666.

⁸ *Sarat Chandra v. Mritunjay*, 1935 Cal. 336, 62 C. 61; *Province of Madras v. R. B. Poddar*, 1949 Mad. 214, 1948—2 M. L. J. 423; *Narayan v. Sheshrao*, 1948 (Nag.) 258; *Pathikona v. Nafiri*, 1955 Andhra 138; *Damodar Sastry v. Nitgiri*, 1955 Mys. 141.

Supreme Court in *Major S. S. Khanna v. Brig. F. J. Dillon*¹ preferred to interpret the expression "case" used in S. 115, C. P. C., in a wide sense and held that it had a comprehensive import and included civil proceedings other than suit and was not restricted by anything contained in the section to the entirety of the proceeding in a civil court. In that case an issue about the maintainability of the suit by the plaintiff had been decided against him by the trial court and the High Court had entertained a revision against the finding on that issue. The view of the High Court was upheld by the Supreme Court.

The order of the lower court will not, however, be set aside, even if erroneous, when it has not caused prejudice to the other party,² and a court of revision will not interfere unless the lower court has acted with such material irregularity as to justify interference.³ An order⁴ refusing to allow amendment of plaint has been held in Oudh not to be open to revision at all.

An amendment cannot be claimed as of right but is entirely discretionary with the courts.⁵ For this reason no hard and fast rule to guide the courts can be laid down. It would be granted or refused according to the circumstances of each case and with due regard to the interest of the other side.⁶

The facts differ from case to case and unless the facts are similar an earlier authority may not apply to a subsequent case.⁷

¹ 1963 A. L. J. 1068 overruling *Budhu Lal v. Mewaram*, 19 A. L. J. 558.

² *Indar Narayan v. Nanak Chand*, 51 P. L. R. 1911, 9 I. C. 267, 193 P. L. R. 1911.

³ *F. A. Gregory v. Albert Pusach*, 49 I. C. 441, 21 P. W. R. 1912.

⁴ *Purshotamlal Ji v. Hara Narayan*, 1940, 6 W. N. 114. But see *Ishwarlal v. State of Maharashtra* I. L. R. 1966 Guj. 660.

⁵ *Santi v. Mulkhraj*, 39 P. L. R. 769, 1937. (Lah.) 894, 175 I. C. 634, 11 R. L. 28.

⁶ *Gurdas v. Bhag*, 11 I. C. 231 (Punj); *Venkatasubbia v. Seshachalam*, 12 I. C. 173, 22 M. L. J. 136, 10 M. L. T. 549, 2 M. W. N. 257.

⁷ *Noor Khatoon v. Samana*, 31 I. C. 7, 9 S. L. R., 61.

Certain general principles may, however, be gathered from reported cases which the courts should always keep in view when dealing with such applications.

General
principles
of grant of
leave to
amend

The correct principles which should govern the grant or refusal of prayer for amendment of pleading, were, as observed by the Supreme Court,¹ enunciated by Batchelor, j. in *Kishandas Rupchand v. Raichappa Vithoba*² in these words :

“All amendments ought to be allowed which satisfy the two conditions—(a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the partiesbut I refrain from citing further authorities as in my opinion they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.” The aim of every court is to see that multiplicity of suits is avoided and that the real matters in controversy between the parties are clearly brought out, and all amendments necessary for these purposes should be allowed provided the other party is not seriously prejudiced and the character of the suit is not altered, and also, provided the object of the amendment is not to abuse the powers of the court and to work a clear injustice. The general principles on which the discretion vested in courts is to be exercised are : (1) the court should not allow a party to raise a new case; (2) it should strive to allow amendments in all cases where the opposite party can be compensated in costs; (3) it should allow amendment where due to supervening factors, new circumstances have come into existence, or the changed circumstances may make the relief claimed inappropriate and so proper relief by way of

¹ P. H. Patil v. K. S. Patil, 1957 S. C. 363.

² I. L. R. 33 Bom. 644 at pp. 649-50.

amendment may be claimed.¹

An amendment questioning the Plaintiff's right to sue or to continue the suit should not be refused,² as also any amendment affecting the jurisdiction of trial court.³ The Supreme Court has observed that a court can take into consideration subsequent events and grant relief in order to attain the ends of justice and shorten litigation.⁴ (4) The court should not permit an amendment by which a legal right acquired by the opposite party is taken away.⁵

Amendments should be allowed in suitable cases in order to overcome the effect of *bona fide* mistakes, whether of law or of fact,⁶ to avoid multiplicity of suits⁷ and an amendment which does not change the subject matter of the suit and is not otherwise unfair can be allowed even in appeal⁸. It does not matter that the original omission arose from negligence or carelessness.⁹ "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs",¹⁰ for, as observed by Bowen, L. J. "there is one panacea which

¹ Rajeshwar Dayal *v.* Padam Kumar Kothari A. I. R. 1970 Raj. 77.

² South India Corporation (Agencies) Pvt. Ltd. *v.* State Trading Corporation of India, A. I. R. 1970 Ker. 138.

³ M. Allauddin V. P. S. Lakshmi-Narayanan, A. I. R. 1970 Mad. 247. See also the case of Abdul Kari *v.* Shursha Mudaliar I. L. R. (1968) 2 Mad. 57.

⁴ H. K. Adhyaru *v.* Chunni Lal A. I. R. 1956 S. C. 655.

⁵ Mary Niemeyer *v.* Ebrahim, 1937 (Rang.) 313. The Bihar Cooperative Motor Vehicle Insurance Society Ltd. App. *v.* Rameshwar Rai & others A. I. R. 1970 Pet. 172.

⁶ K. E. A. K. A. Sahib *v.* K. M. Adamsa, 81 I. C. 465, 2 R. 66, 1924 (Rang.) 249. Firm Bidhi Chand *v.* Basdev Pd. 1968 A. L. J. 235.

⁷ Nilpal Bhai *v.* Jaswant lal Zina Bhai A. I. R. D.C. 997.

⁸ Ram Dhan *v.* Lachmi Narain, 16 I. C. 648, 1937 (P. C.)42 (P. C.) 1937 A. W. R. 184.

⁹ Gulabrao *v.* Manjoolbai, 1928 (Nag.) 203, 109 I. C. 293; Mahomed Husein *v.* Ko Maung, 117 I. C. 563, 1929 (Rang.) 33.

¹⁰ Clarapede *v.* Commerical Union Association, 32 W. R. 262; Weldon *v.* Neal, 19 Q. B. D. 394; Manjidutta *v.* Klannad, 16 I. C. 785 (Cal.) Lummna Summana Malick *v.* Dharam Rao Chougule A. I. R. 1971 Mys. 284.

heals every sore in litigation, and that is costs.”¹ There is no kind of error or mistake which, if not fraudulent or intended to over-reach, ought not to be corrected if it can be done without injustice to the other party.² All amendments which do not throw an unnecessary or unreasonable burden on the other side should be allowed and only those which cannot be compensated by award of costs should be refused.³ Grant of amendment should therefore be the rule, and refusal the exception. In Patil’s case already referred to the Supreme Court held that the amendments ought to be allowed which satisfy the two conditions, (a) of not working injustice to the other side and (b) of being necessary for the purposes of determining the real questions in controversy between the parties.⁴ Recently the Supreme Court has again emphasized that rules and procedure are intended to be handmaid to the administration of justice and a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. Also the court always gives leave to amend the pleading of a party unless it is satisfied that the party applying was acting malafide or that by his blunder he had caused injury to his opponent which may not be compensated for by an order for costs. However, negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.⁵

Delay

But the words “however late the proposed amendment” must not be understood to mean that a counsel may unnecessarily delay an amendment. Indeed it is of the first importance that an amendment should be applied for immediately the pleader comes to the conclusion that an amendment is necessary. If, for example, a witness has come to him

¹ *Cropper v. Smith*, (1884) 26 Ch. D. 700, 711.

² *Ibid.*

³ *Kovduru v. Jagani*, 1946 (Mad.) 324.

⁴ *P. H. Patil v. K. S. Patil*, 1957 S. C. 363.

⁵ *Jai Jai Ram Manohar v. National Building Material Supply Co.*, A. I. R. 1969, S. C. 1267.

who has given a credible statement which shows the necessity for an amendment, the pleader. An amendment, though late, may be allowed, but the applicant must show why the application is made so late and must satisfy the court that the delay is not deliberate and the amendment has been prayed for with reasonable promptitude. Application before the beginning of trial cannot be said to be belated.¹ Late applications for amendment should it be submitted, be rejected, if *there has been unexplained delay in making the application*. The Privy Council has laid down that an amendment should not be allowed after the conclusion of the trial and arguments.² The Patna High Court in a suit for declaration defended on the plea of S. 42, Specific Relief Act refused to allow the addition of a relief for possession when the application was made just before the delivery of the judgment.³ But the same H. C. has held in a case where there was no question of delay, that the fact that amendment will enlarge the scope of the claim is no ground for refusal.⁴ The Supreme Court has, however, held that an amendment including a prayer for consequential relief in a declaratory suit should have been allowed by the High Court in first appeal though time barred as it did not raise a new case but only an additional approach to the pleaded facts and was necessary for a decision of the real dispute between the parties.⁵ The Calcutta and Nagpur High Courts have held that mere delay is no ground for rejecting an application for amendment,⁶ but the Nagpur High Court refused an application to

¹ Dharmalinga v. A. M. Krishnaswami, 1949 Mad. 467, 1948—2 M. L. J. 644, 1949 M. W. N. 71.

² Shanmugha Rajeswara v. Chidambaram Chettiar, 1938 M. W. N. 471, 173 I. C. 772, 1938 P. C. 123, 1938 A. L. J. 292 P. C.

³ Bhup Narayan v. Hira Lal, 161 I. C. 709, 1936 (Pat.) 186.

⁴ Tika v. Hiralal, 195 I. C. 428, 1941 (Pat.) 276.

⁵ A. K. Gupta and Sons Ltd. v. Damodar Valley Corporation A. I. R. 1967 S. C. 96. Also See Rukhma Bai v. Laxminarayan 1960 A.L.J. 45 (S. C.) and Mahabir Pd. Singh v. Narmadeshwar Pd. Singh A. I. R. 1967 Pat. 326.

⁶ Gulabrao v. Manjoolbai 109 I. C. 293, 1928 (Nag.) 203; Saradudu v. Jaharlal, 46 C. W. N. 33, 74 C. L. J. 61, 1942 (Cal.) 153.

set up new pleas when there was no excuse for not raising them in the beginning¹. The true position appears to be that any delay in applying for amendment is a material factor to be considered by the court before exercise of its discretion. Depending on the facts and circumstances of the case amendment may be allowed notwithstanding the delay or it may be rejected. Thus a belated amendment to treat a suit for dissolution of partnership and accounts as one for remuneration as an agent of the partnership was rejected.² So also an amendment seeking to introduce allegations of corrupt practices in an election petition beyond the period of limitation was disallowed.³ Where a plea of non-joinder had been raised in the written statement, the prayer of the plaintiff seeking to remove the defect at the Supreme Court stage was rejected.⁴

In another case the Supreme Court rejected the request for amendment of pleading for introducing a family custom with regard to succession to Non-Taluqdari estate mainly on the ground of delay. This contention was refused to be raised as it would give a "fresh lease of life".⁵ An amendment taking away an admission in pleadings was disallowed at the stage of arguments.⁶ On the other hand a formal amendment which did not change the nature of the suit was allowed even when the judgment was reserved. In a suit for damages against the state, a plea that the contract not being in accordance with Art. 299 of the Constitution was invalid and unenforceable, it was held that the plea should have been accepted.

A legal representative of a deceased plaintiff is not entitled to ask for an amendment which the deceased could not have asked for. When the holder of an impartible estate

¹ *Badridas v. Raja Pratapgir*, 1940 (Nag.) 8, 1939 N. L. J. 525.

² *Brij Mohan v. Vallharia* A. I. R. 1965 Raj. 172.

³ *Baj Nath Bhalotia v. State Bank of India* A. I. R. 1967 Pat. 386.

⁴ *Kanak Rathammal v. Lognath* A.I. R. 1965 S.C. p. 271.

⁵ *Raj Kumar Mohan Singh v. Raj Kumar Pasupat Nath Saran Singh* A. I. R. 1970 S. C. 42

⁶ *Karanpura Development Co. Ltd. v. State of Bihar* 68 C. W. N. 965.

in Madras sued for a declaration that a promissory note and a lease obtained from him by the defendant were void as they had been obtained by fraud and undue influence and after his death his legal representative who was brought on record applied for amendment of the plaint by raising the contention that the transactions are not binding on the estate as the deceased had only a life estate and was not competent to alienate it beyond his life time, it was held that as the deceased could not have himself challenged his own alienation and claimed this relief, the amendment could not be allowed.¹

The exceptional circumstances under which an amendment should be refused are the following :

When amendment should be refused

1. Where amendment is not necessary for the purpose of determining the real question of controversy between the parties :

This happens where the amendment is merely technical or is of no substance.²

(1) When it is unnecessary

Where, after the close of the plaintiff's case, the defendant applies for amendment of his written statement for the purpose of taking a purely technical objection to the maintainability of the plaintiff's suit, the application should be rejected.³

The object of the rule being to enable the real questions in dispute to be raised in the pleadings, leave to amend cannot be granted to the plaintiff, where the proposed amendment would not help him in substantiating his claim,⁴ and to the defendant when the proposed amendment would not help him in supporting his defence.⁵ Thus in a case where A sued B and seeing that the claim against

¹ V. T. Elaya Pilai *v.* Ramaswami, 1947 Mad. 165, 1946—2 M. L. J. 373, 1946 M. W. N. 745.

² South India Corporation *v.* State Trading Corporation A. I. R. 1970 Ker 138.

³ Collete *v.* Goode, 7 Ch. D. 842.

⁴ Moral Bross & Co. *v.* Westmoreland, 1 K. B. 64, 77.

⁵ Machado *v.* Fontes, 2 Q. B. 231.

B would fail, he applied for impleading C as defendant, the application was refused as the court thought that A would not be entitled to any relief against C also.¹

“The questions in controversy” are such questions which are in controversy between the parties when written statement is filed but not questions which parties neither wish nor intend to dispute till that stage but which at a later stage they may think of raising.² The court would as a rule decline to allow amendment if a fresh suit on the amended claim would be barred by limitation. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered and does not affect the power of the court to order it if that is required in the interest of justice.³

(2) When it would cause injury to the opponent

2. Where the amendment would cause to the opposite party such injury as cannot be compensated by costs :

Thus, leave to amend will be refused if it would prejudice a right already accrued to the other party on the pleading as then standing.⁴ A sued a Tramway Company for damages caused by negligence. The defendant only denied the negligence. Six months later, an application was made for adding the plea that the liability to maintain the roads had been transferred to a local authority which, and not the defendant, was liable. As on the date of this application the suit had become barred against the local authority, leave to amend was refused, because, if amendment were allowed, the suit would fail.⁵ Similarly, the addition of a new cause of action after the period of limitation is generally

¹ Jones *v.* Hughes, 1 Ch. 180, 187.

² Beniprasad *v.* Narayan Glass Works, 1949 Ajmer 19.

³ L. J. Leach & Co. Ltd. *v.* Jardine, 1957 S. C. 357. See Bisweswar *v.* Jineshwar A. I. R. 1968 Cal. 213. and Thommen Themm *v.* Vsuran Khan I. L. R. (1967) 1 Ker. 368. where amendment was allowed beyond limitation.

⁴ Karsondas *v.* Surujbhan, 145 I. C. 630, 35 Bom. L. R. 229, 1933 Bom. 450.

⁵ Steward *v.* North M. T. Co., 16 Q. B. D. 556.

refused.¹ The leading English case is *weldon v. Neal*,² which was a suit for damages for slander, and leave to add fresh claims in respect of assault and imprisonment after the period of limitation for a suit in respect of them had expired was refused. Where an amendment is refused by the trial court as very late, the Appellate Court is justified in not interfering, if its effect is to interfere with the rights of parties regarding the plea of limitation.³ For the same reason, a suit for rent was not allowed to be converted into one for damages for use and occupation at a time when a suit for the latter relief would be barred by limitation⁴ and a suit for declaration was not allowed to be converted into one for possession when the relief for possession was barred.⁵ A plaintiff who had obtained a mortgage in his favour and afterwards a sale deed and sued for possession on the basis of sale deed was not allowed to amend the plaint so as to base his suit on the mortgage as a suit on mortgage was barred by limitation on the date of the application for amendment.⁶ In special cases, however such amendments have been allowed. For instance, where the cause of action is the same, but the plaintiff has made a mistake as to the appropriate remedy he would be entitled to in law, amendment may be allowed in second appeal, provided the error was *bona fide* (such as due to conflict in High Court rulings).⁷ In another case, A, alleging that he had invested Rs. 4000 as capital under a partnership agreement between him and the defendant, sued for dissolution of partnership and for accounts, but it was clear

¹ *McLeod & Co. v. Ivan Jones*, 87 I. C. 218 (Cal.)

² Q. B. D. 394; *also see Janardhan v. Shib Prasad*, 43 C. 95; *Bal Karan v. Gaya*, 36 A. 370; *Sinehi Ram v. Agent, E. I. Ry.*, 64 I. C. 125, 2 Pat. L. T. 679.

³ *Sanathana Krishna v. Chellappa*, 101 I. C. 390, 38 M. L. T. 345.

⁴ *Veerabhadra v. Vythanathasami*, 99 I. C. 977 (Mad.) *See also Chinta v. Gunna*, 133 I. C. 497, 1931 (Mad.) 542, 61 M. L. J. 316.

⁵ *Damar v. Jagdip*, 165 I. C. 21, 1936 (Pat.) 535.

⁶ *Chunilal v. Abdul Dawood*, 1948 (Bom.) 140, 349 Bom. L. R. 748.

⁷ *Mullaveetil v. Achutan*, 21 M. L. J. 475, 10 I. C. 218, 9 M. L. T. 499.

from the proceedings of the trial court that A really intended to claim his Rs. 4000 and the defendant pleaded to the money claim, and that claim had been put in issue and evidence was adduced on it. The lower court found that the money was due, but dismissed the suit on the finding that the agreement set up did not constitute a partnership. The Appellate Court allowed the plaintiff to add a prayer for the recovery of Rs. 4,000 though at the date of amendment the claim for money was barred by limitation.¹ In another case, plaintiff was allowed to convert a suit on a promissory note into one on original consideration after limitation on the ground that the plaintiff could have originally made such an alternative claim that he should not lose on a technical ground.² Similarly, in a suit for recovery of books of account against a servant, leave to add a prayer for recovery of money due from the defendant was allowed after the period of limitation,³ but in this case no convincing reasons are given in the judgment for departing from the general principle.

Similarly, a plaint should not be amended so as to take away a valid defence of limitation.⁴ Thus, when a suit for loan alleged to have been taken on a particular day was dismissed as barred by limitation, an application for amendment so as to change the date of loan was refused in second appeal.⁵ Where, however, the plaintiff's conduct has been *bona fide* throughout, the High Court allowed even an amendment which deprived the defendant of the benefit of the rule of limitation. That was a case questioning the correctness of a particular portion of the boundary line

¹ Kishendas v. Rachappa, 33 B. 644.

² Krishna Pd. v. Ma Aye, 1936 (Rang.) 508, 165 I. C. 810.

³ Sevugan v. Krishna, 36 M. 378, 13 I. C. 268, M. L. T. 557.

⁴ Raliaram v. Ramchandra, 144 I. C. 822, 1933 (Lal.) 774 (1); Byash v. Ajodhiya, 1932 Rang. 26, 10 R. 74; Parbhudas v. Lallubhai, 137 I. C. 710, 34 (Bom.) L. R. 35, 1932 (Bom.) 117; Kesho Das v. Hari Kishun Das, 17 Pat. 268, 1938 (Pat.) 205, 1938 P. W. N. 431, 19 P. L. T. 579, 175 I. C. 354, 10 R. P. 620; Narayanamurti v. Surya Narayan, 168 I. C. 980, 1937 (Mad.) 122.

⁵ Addanki v. Madduri, 96 I. C. 700, 1926 (Mad.) 827, 51 M. L. J. 414, (1926) M. W. N. 392.

between two villages and the amendment sought was to question other portions of the boundary line.¹ In another case, when defendant resisted the plaintiff's claim on the ground of limitation, an amendment by which plaintiff sought to plead an acknowledgment was allowed though applied for at a late stage, the court remarking that the delay may influence the court in deciding whether the acknowledgment was genuine or not, but the amendment should be allowed as it did not alter the nature of the case.² Similarly, in a suit which was claimed to be within limitation from the date of a part payment, an amendment to add an acknowledgment also as an additional ground for saving limitation was allowed.³ In another case the plaintiff claimed exclusion of a certain period from limitation but he was allowed to amend the plaint so as to claim extension from an acknowledgment contained in a letter produced and relied on by the defendant himself.⁴ In another case on the basis of pronote which was found to be technically void, an amendment to enable plaintiff to sue on the original consideration was allowed even after limitation on the ground of justice.⁵

A suit based on an agreement recognizing service was also allowed to be amended after limitation into a suit based upon service as the difference between the two kinds of suits was held to be only technical.⁶

3. Where the application for amendment is not made in good faith :

(3) When not bona fide

When there is no substantial ground for the case pro-

¹ Nagalingam *v.* Siva, 140 I. C. 500, 63 M. L. J. 725, 1932 M. W. N. 1116. Also See A. I. R. 1967 S. C. 96 and A. I. R. 1967 Patna 326.

² Kishenlal *v.* Ram Chandra, 55 A. 256, 145 I. C. 859, 1933 A. L. J. 268, 1933 All. 374.

³ Muthammal *v.* Gurusami, 67 M. L. J. 921; Jogendra *v.* Debendra, 1937 (Cal.) 485; Satgur Nath *v.* Brahma Datta, 1937 (Oudh) 391, 168 I. C. 799.

⁴ Fatehchand *v.* Vasudeo, 1948 Nag. 334.

⁵ Chellam Sakka *v.* Muthusamy, 165 I. C. 503, 1936 (Mad.) 632 following Charan Das *v.* Ameer Khan, 57 I. C. 606, 18 A. L. J. 1095, 25 C. W. N. 289 (P. C.)

⁶ Bai Kamala *v.* Shankar Rao, 1943 (Bom.) 407.

posed to be set up by the amendment,¹ or the object is to defeat or delay the plaintiff's claim,² or merely to reagitate the same questions and lead further evidence.³ the amendment was rejected as not being in good faith. Great delay in making the application has also been held to show the applicant's *mala fides*.⁴ But it is not always that the *bona fides* or absence of it can be determined at the stage at which application is presented. There are cases in which this can be known only after the evidence is let in. The truth and falsity of case put in the amendment application should not be considered.⁵

(4) When it changes the character of the suit

4. Where the amendment would introduce a totally different, new and inconsistent case and the application is made at a very late stage of the proceedings :

An amendment of this character is not necessary for "determining the real question in controversy"; it rather implies an abandonment of the real issue, and should not therefore ordinarily be allowed.⁶ In the old Code of 1882, there was an express provision that such amendments should not be granted. The same has not been reproduced in the present Code, but the reason of the omission is not that any change of law was thereby intended, but that it was intended to make the question of amendment entirely discretionary with the court and it was not thought advisable to fetter that discretion by an inflexible and mandatory rule that no amendment shall be allowed if it changes a suit of one character into a suit of another and inconsistent character. The court may, in very rare cases and under exceptional circum-

¹ Lawrence v. Norreys, 39 Ch. D. 213, 38 W. R. 753.

² Mahomed Hussain v. Ko Maung, 117 I. C. 563, 1919 (Rang.) 33.

³ Hodaun Ningal v. Khondrain Ningal A. I. R. 1965 Mainpur 14.

⁴ Krishna v. Pachaiyppa, 47 M. L. J. 540, 82 I. C. 492; Beni Prasad v. Narayan Glass Works, 1949 Ajmer, 19.

⁵ Dharmalinga v. A. M. Krishnaswami, 1949 Mad. 467, 1948—2 M. L. J. 649, 1949 M. W. N. 71.

⁶ Gobardhan v. Sita Ram 164 I. C. 1085, 1936 (Pat.) 491; Ram Jiwan v. Mt. Maharani, 1936 (Nag.) 295; Badridas v. Raja Rratapgir, 1940 (Nag.) 9; Jaldu Anantha Raghuran v. Jaldu Bapannarav, 1959 A. P. 448.

tances, allow even such amendments,¹ provided the application is made at a very early stage of the suit and long before the trial, and provided the change in the character of the suit is merely technical and not substantial. Amendment cannot ordinarily be allowed where it would convert the suit into one of a totally different character based on entirely different and wholly inconsistent allegations with the original plaint and would involve a fresh trial with fresh pleadings and fresh evidence.² A suit for setting aside a decree on the ground of fraud was not allowed to be changed into one on the ground of *bona fide* mistake of parties.³ In one case an amendment even introducing an inconsistent case was permitted on the ground that it met the ends of justice by allowing the whole question in dispute to be decided between the parties and in order to avoid unnecessary litigation.⁴ In another case, an amendment introducing a new case of fraud was allowed just before judgment on payment of entire costs.⁵ But the mere fact that an amendment seeks to state a case in the alternative is not by itself a sufficient ground for disallowing it.⁶ In a suit by A against B for ejectment, Government was joined, as B had given out that he had taken a lease from the Government which was the owner of the land. Government admitted that it was not the owner and the suit was decreed against. B filed an appeal and impleaded Government also as respondent. Government applied for amendment of its written statement by pleading that the land belonged to it and not to A. It was held that such an amendment which was diametrically opposed to the original plea could not be allowed.

In a case in which the plaintiff had sued for specific performance and compensation, an alternative, plea (about

¹ Sheonarain v. Ram Prasad, 74 I. C. 317, 1923 (Nag.) 241.

² Badridas v. Raja Pratapgir, 1940 (Nag.) 8.

³ Shib Ram v. Md. Musaddar, 1947 (Cal.) 17.

⁴ Ghulam Haider v. Sardar Ali, 73 I. C. 748 (Pesh.)

⁵ Chartered Bank v. Imperial Bank, 1930 Cal. 534, 57 C. 398.

⁶ Sobhanardi v. Venkatarammayya, 98 I. C. 458, 1927 (Mad.) 212.

four years after the institution of the suit and just before trial) abandoning his claim for specific performance and claiming damages for breach of contract, maintaining all the allegations in the plaint as they formerly stood, was allowed. Their Lordships of Privy Council held that the court technically had power to allow the plaintiff to change the character of his suit at that stage, but such amendments should not be allowed without proper appreciation of its serious effect upon the position of the parties in each individual case. Their Lordships further remarked : "Indeed, so serious in many cases is the exercise of this power that to their Lordships it would appear to be a wise precaution for a judge before allowing any such amendment in a contested case to require the plaint to be remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else. The extent and propriety of what is asked for will thus be made apparent and the amendment will be allowed or refused with a due appreciation of the position." In this case their Lordships were impressed by the difficulty of the defendant¹ who had owing to the pendency of the suit for 4 years been under a sort of injunction against dealing with the property in derogation of the plaintiff's claim thereto.²

The general rule as enunciated by the Privy Council is that, "any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid, and that the state of facts and equities and grounds of relief originally allowed and pleaded by the plaintiff should not be departed from."³ Amendment of a written statement was thus refused in a case on the ground that the defendant wanted by the amendment to take pleas inconsistent with

¹ *Nasiruddin v. Lala Babu*, 1945 (All.) 197.

² *Ardesbir v. Flora*, 1928 (P. C.) 208, 32 C. W. N. 953, (Bom.) L. R. 1242, 55 M. L. J. 523, 48 C. L. J. 451, 55 I. A. 360, 111 I. C. 413.

³ *Esher Chander v. Shama Charan*, 11 M. I. A. 7 (P. C.); *Mylapor v. Yeokay*, 14 C. 801, 14 I. A. 168; *Mukhoda v. Ram Churan*, 8 C. 871; *Hamilton v. Land Mortgage Bank*, 5 A. 456; *Khushi Ram v. Munshilal*, 1940 (Lah.) 226, 189 I. C. 418.

those originally taken by him.¹ In a M. P. case a defendant who was sued for possession of *abadi* land on the ground that his transferor had a non-transferable license therein and had admitted this fact in trial court was not allowed to raise by amendment the new question that his transferor was proprietor of the land.² In another case, permission to amend a written statement so as to set-up a plea of *jus tertii* in answer to the plaintiff's claim for recovery of possession was refused by the appellate court.³ It is not difficult to see in each case whether the proposed amendment does or does not change the character of the suit. The cause of action on which the original suit was based must not be changed nor the specific legal relation alleged to exist between the parties, nor the specific title on which the plaintiff bases his claim. Any amendment which is directed to alter either of these three things is an amendment involving alteration in the character of the suit. For instance, when plea of fraud is set up for the first time by amendment⁴ or when one kind of fraud is alleged and another kind of it is sought to be substituted.⁵ Where the plaintiff sued for redemption alleging title under a purchase and the defendant set up title under another sale-deed, and in appeal it was contended for the first time that the plaintiff's vendor had no title as he was not the nearest reversioner to the deceased and thereupon the appellate court allowed the plaintiff to amend his plaint so as to trace his title from certain persons from whom his vendor got the properties, it was held that the amendment should not have been allowed as its effect was to allow the plaintiff to set up a new case in contradistinction to that set out in the plaint.⁶ Where the plaintiff had set out in the plaint a particular interpretation of the document which was the basis of the suit, an amendment where-

¹ Fazal Nur *v.* Bibi Rani, 120 I. C. 492 (Lah.)

² Chunnialal *v.* Decoram, 1948 (Nag.) 119.

³ Subhayya *v.* Chandrayya, 1941 (Mad.) 811.

⁴ Mt. Kanta *v.* Srimati Kalavati, 1946 (Lahore) 419.

⁵ Abdool Hasan *v.* Turner, 11 B. 620, 14 I. A. 111.

⁶ Ibramsa *v.* Mahomed Esuf, 30 L. W. 557.

by he wanted to set out a different interpretation was held not to change the character of the suit.¹

In order to afford some help in the determination of this question it is proposed to set down here, with reference to rulings, some examples of amendments which amount to a change of character of the suit and of those which do not.

Instances of
change in
character

Examples of cases of amendments refused as amounting to a change in the character of the suit :— Original claim for rent on contract of tenancy; amended claim for damages for use and occupation.² Claim for ejectment on the ground that defendant was tenant, amended claim for possession on ground of title.³ Claim for hire of cargo boats on the ground that defendant hired them from plaintiff; amended claim for agency account on the allegation that defendant was plaintiff's agent for procuring hires.⁴ Claim for dower on written agreement; amended claim for dower on custom.⁵ Claim for money paid by defendant to X on the ground that the payment was unauthorized; amended claim for damages for defendant's negligence in selecting X as agent for the plaintiff.⁶ Claim for declaration of title; amended claim for specific performance.⁷ Suit for declaration of plaintiff's one-third share and joint possession on the ground that plaintiff had purchased a widow's right in one-third share and redeemed it from mortgagee in 1910; amended claim (after the defendant's plea of adverse possession) that the widow had herself redeemed in 1910 and plaintiff succeeded her

¹ Subramanian v. Vasudevan, 160 I. C. 989, 1936 (Mad.) 151.

² Bindeshwari v. Bisheswar, 30 I. C. 499, 3 O. L. J. 383; O'Leary v. Maung Gaing, 11 I. C. 863, 4 Bur. L. T. 197; Khiaram v. Chhatomal, 20 I. C. 570, 7 S. L. R. 23; Surendra Narain v. Bhai Lal, 22 C. 752; Veerabhadra v. Sri Vythinathasami, 1927 (Mad.) 182, 99 I. C. 977 *contra* Maung Po Shim v. Mohammad Thambi, 30 I. C. 753. (Lower Burma)

³ Chandmal v. Muhammad, 1935 A. M. L. J. 100.

⁴ Shib Kristo Sircar v. Abdul Hakim, 5 C. 603.

⁵ Khaja Md. v. Maiya Begum, 14 C. 420.

⁶ Hamilton v. Law Mortgage Bank, 5 A. 456.

⁷ Jiwanlal v. Allah Jawaya, 133 I. C. 646, 1931 (Lah.) 595.

in 1916.¹ Claim that father made the sale to pay immoral debts; amended claim that the father could alienate his share only² (for in the former case joint family was alleged, in the latter the contrary). Claim based on gift by will; amended claim based on inheritance.³ Claim for share of produce of property left undivided at partition; amended claim for partition of that property.⁴ Claim for setting aside a decree for partition detailed in promise into one based on recognition of the validity of that decree and for a relief arising from that decree.⁵ Claim for specific performance; amended claim to cancel the contract and retain the deposit.⁶ Claim to redeem one mortgage; amended claim to redeem another,⁷ provided the suit for the latter would be within time on the date of amendment.⁸ Claim for ejectment; amended claim for declaration of reversionary rights.⁹ Claim for property as devisee under a will; amended claim for the same on the ground of want of title in testator to devise.¹⁰ Claim for possession as full owner; amended claim for defendant's ejectment by plaintiff as manager of *waqf* property.¹¹ Claim for redemption as mortgagor; amended claim to enforce a right as owner.¹² Claim for declaration that properties are trust property; amen-

¹ Chandradat *v.* Ghulam Mahammad, 93 I. C. 871 (Lah.).

² Sheonarayan *v.* Bhagwan Dutt, 11 W. R. 10; Narayan *v.* Javher, 12 B. 431.

³ Jankee *v.* Jhajhoo, 2 N. W. P. H. C. R. 407.

⁴ Gauri Shanker *v.* Atma Ram, 18 B. 611.

⁵ Chiranjilal *v.* Ram Kanwar, 1948 East Punjab 26.

⁶ Stone *v.* Smidt, 35 Ch. D. 188.

⁷ Govindrav *v.* Ragho, 8 B. 543; Pratap *v.* Ram Sewak, 96 I. C. 304 (where amendment was applied for in second appeal). *Contra* Parashor *v.* Gama, 5 Bom. L. R. 643, (where alternative case was set up, by the amendment).

⁸ Gauri Shankar *v.* Lala, 171 I. C. 437, 1937 O. W. N. 1121.

⁹ Ramanandan *v.* Pulikutti, 21 M. 288; *contra* Gurdit Singh *v.* Mt. Parmeshri, 19 I. C. 928, 238 P. L. R. 1913, 142 F. W. R. 1913.

¹⁰ Mylapore *v.* Yeo Kay, 14 C. 801, 14 I. A. 168.

¹¹ Ramdas *v.* Daulat Ram, 225 P. L. R. 1913, 18 I. C. 807, 114 P. W. R. 1913.

¹² Nank To *v.* Ma Hanin, 36 I. C. 5, 9 Bur. L. T. 150; U. Naing *v.* Ko Sein, 1938 (Rang.) 125, 176 I. C. 631.

ded claim that plaintiff has a life interest or charge for maintenance in them.¹ Claim based on custom of pre-emptions; amended claim on contract, set up in the Appellate Court.² Claim of pre-emption on the ground that plaintiff is a co-sharer, amended claim on the ground of relationship.³ Claim for possession; amended claim for redemption (in second appeal).⁴ Claim on account stated in a particular year; amended claim on account stated in a previous year after the former account stated was found to be a forgery.⁵ Claim for dissolution and rendition of account of partnership; amended claim for remuneration of agent or servant of defendant.⁶ Claim against the Secretary of State based on negligence; amended claim based upon nuisance.⁷ Claim for ejectment; amended claim for partition.⁸ Claim for redemption; amended claim by the representative of the plaintiff who died *pendente lite* that the mortgage was not binding on him.⁹ Claim for rent; amended claim for damages for breach of an agreement to take on lease.¹⁰ "Suit based on allegations setting out grounds for non-performance of a contract, amended claim denying the contract."¹¹ Claim for redemption; amended claim for avoidance of a sale on payment of a portion of the consideration money.¹² Claim for possession by declaration that the defendant's

¹ Nazir Ahmad *v.* Taj Mahal Begum, 1940 (Lah.) 63, 186 I. C. 828.

² Ram Garib *v.* Shanker, 20 A. L. J. 15, 66 I. C. 242, L. R. 3 A. 636.

³ Baijnath *v.* Ram Pyari, 1947 All. 221, I. C. 75.

⁴ Munna Lal *v.* Makiulal, 24 I. C. 723 (All.); Kalane *v.* Virupak shapa, 7 B. 146.

⁵ Bhairon Prasad *v.* Gajadhar Prasad, 23 I. C. 587, 19, C. W. N. 170.

⁶ McIverny *v.* Secretary of State, 13 I. C. 370, 38 C. 797.

⁷ Vaithilinga *v.* Minigan, 37 M. 529, 23 M. L. J. 189, 15 I. C. 299, 1912 (M. W. N.) 1127.

⁸ Ram Sahai *v.* Alopri Prasad, 148 I. C. 243, 1934 Lah. 38; Divi Sheshacharyulu *v.* Divi Lakshmi Narayan, 1946 (Mad.) 105.

⁹ Inaganti *v.* Venkataligama, 42 M. L. J. 43, 68 I. C. 703, 30 M. L. J. 204.

¹⁰ Karam Chand *v.* Hurdial 11 I. C. 849, 4 Bur. L. T. 181.

¹¹ Krishnamachariar *v.* Arunachala, 105 I. C. 563, 1927 (Mad.) 973, (1926) M. W. N. 668.

¹² Ram Bilas *v.* Brij Narain, 14 I. C. 743, 11 M. L. J. 424.

mortgage was fictitious; amended claim for redemption of that mortgage.¹ Claim for redemption; amended claim for possession on the ground that the mortgage is not binding on the plaintiff as it was without consideration and without necessity.² Suit by A against his partner B after dissolution of partnership for price of articles supplied by A to B during partnership; amended claim for accounts of partnership.³ Claim on the footing that defendant was carrier; amended claim based on his liability as bailee.⁴ Claim for annuity by sale of mortgaged property; amended claim for 12 years' annuity.⁵ Claim as *krittima* son; amended claim as *appatbitta* son.⁶ Claim as owner, amended claim in second appeal as *benamidar* when plaintiff had from the beginning repudiated that character.⁷ A suit for specific performance and damages against a Hindu father and his joint sons; after the death of father, specific performance given up and suit for earnest money as money had and received by the father.⁸ Suit against manager of idol personally; suit against the idol.⁹ Suit for accounts of partnership started in 1921; suit on partnership started in 1919.¹⁰ Suit for price of goods sold, amended claim (in second appeal) for damages for wrongful sale of goods by purchaser.¹¹ Suit for partition, suit for administration;¹² claim that cer-

¹ Laxmi Shankar v. Haujab Bhai, 44 B. 515, 57 I. C. 426, 22 Bom. L. R. 735.

² Tohlu v. Buta, 67 I. C. 132, 3 Lah. L. J. 184.

³ Beragi v. Raja Ram, 10 I. C. 250, 163 P. L. R. 1911, 214 P. W. R. 1911.

⁴ Louis Dreyfus & Co. v. Secretary of State, 45 I. C. 173, 11 S. L. R. 103.

⁵ Masuma v. Tahira, 11 A. L. J. 580, 19 I. C. 661.

⁶ Maung Ba v. Maung Than, 1926 (Rang.) 49, 3 R. 83, 92 I. C. 253.

⁷ Kulsambai v. Mandwiwalla Firm, 1939 (Sind) 281.

⁸ Ramasaran v. Mahabir, 100 I. C. 56, 25 A. L. J. 74, 1926 (P.C.) 187, 1927 (M. W. N.) 69.

⁹ Avadh Behari v. Parmeshur, 6 O. W. N. 1036.

¹⁰ Haji Adam v. Nihal, 1933 Sind 131, 144 I. C. 25.

¹¹ Baijnath v. Joharchand, 1933 All. 404, 144 I. C. 82, 1933 A. L. J. 1000.

¹² Ma Waung Ma Gyi v. Ma Bu Gyi, 174 I. C. 39, 10 Y. R. 384, 1937 (Rang.) 525.

tain transactions were vitiated by fraud and undue influence, amended claim that though the transactions were valid they would not bind the estate or plaintiff's successor.¹

A plaintiff was not allowed to change the ground of exemption from limitation from one of payment under S. 20 to one of acknowledgment under S. 19 of the Limitation Act of 1908.²

In a suit plaintiff claimed a sum to be ascertained on taking account and afterwards added new defendants against whom no relief was claimed. On the suit being dismissed on a technical ground, the plaintiff on appeal wanted to amend the plaint so as to claim a declaration of his title to a specific portion of the amount held in deposit by the original defendants and also claimed a relief against the added defendants. The court disallowed such an amendment.³ In a suit *for* account amendment to convert the suit into one *on* account was refused on the ground that the plaint would require amendment in many particulars and a second suit would not be barred by limitation.⁴ A suit for redemption on ground of satisfaction filed nearly 60 years after the mortgage without an offer to pay whatever might be found due was not allowed to be amended by addition of such offer.⁵ To a suit for dissolution of partnership defendant made a counter claim based on a term of partnership restraining the plaintiff from engaging in a rival business; the plaintiff contended that it was agreed that this clause would not be enforced and prayed for amendment of plaint by including a prayer for rectification. The Bombay High Court held that this would change the character of the suit.⁶

In a case which was remitted by the Full Bench, the

¹ V. T. Elaya Pillai *v.* Ramasami, 1947 Mad. 165, 1946—2 M. L. J. 373, 1946 M. W. N. 745.

² Thakurdas *v.* Sant Ram, 1949 East Punjab 219.

³ Mohd. Ara Husain *v.* Nawab Bagar, 171 I. C. 33, 1937 (Oudh) 484.

⁴ Mulomal *v.* Tarachand, 161 I. C. 505, 1936 (Sind) 9.

⁵ Purshuttam *v.* Vasant, 1943 (Bom.) 259, 45 Bom. L. R. 489.

⁶ Ram Jahn *v.* Yahyabhai, 1947 Bom. 149.

plaintiff sought amendment of the plaint in order to negative the decision of the High Court. The amendment was refused as it would have nullified the earlier decision of the High Court.¹ In a partition suit, on the death of the defendant, the plaintiff sought amendment to claim the entire property as heir of the defendant. The amendment was refused on the ground that it would change the cause of action by converting the partition suit into a suit for title and possession.²

Examples of cases of amendments not amounting to a change in the character of the suit. Instances of no change

Claim for declaration; amended claim for consequential relief.³ Claim for declaration of title and possession of alluvial land; amended claim to include title by local usage not originally alleged.⁴ Claim for declaration that defendant had no title or possession and claim that the property had been purchased Benamia in defendant's name.⁵ Claim for declaration that plaintiff and defendant are joint owners of money in the hands of the deceased as they were both his heirs; claim for administration of the estate of the deceased.⁶ Claim for direct possession; amended claim for possession conditional on the defendant's failure to redeem.⁷ Claim for injunction restraining defendant from tying cattle on plaintiff's land; amended claim for possession.⁸ Claim based on *bundi* or promissory note; amended claim based on original consideration independent of the *bundi* or promis-

¹ Mohd. Jaffar Ali *v.* Rajeshwar Rao, A. I. R. 1971, AP 156 (FB).

² Ashwath Rao *v.* Sushila Bai A. I. R. 1971 Mys 141.

³ Limba *v.* Rama, 13 B. 548; Chomu *v.* Umma, 14 M. 46; Purna Chandra *v.* Sabrui, 35 C. W. N. 620; Bal Mukund *v.* Madan, 1935 Lah. 91 *contra*; Sriram *v.* Khwaja, 1934 (Lah.) 235 (Plaintiff had persisted and prayed for amendment in appeal).

⁴ Shahabuddin Sarcar *v.* Kafiluddin Tapadar, I. L. R. (1938) 1 Cal. 361.

⁵ S. K. Wajid Ali *v.* Mst. Jiga Bai A. I. R. 1968 Orissa 163.

⁶ Mt. Latifanbai *v.* Mt. Sakinabai, 181 I. C. 770, 1939 (Sind). 107.

⁷ Nilkanth *v.* Suresh Chandra, 12 C. 414 (422), 12 I. A. 17; Dullabh Das *v.* Lakshmandas, 10 B. 88.

⁸ Syed Waris Ali *v.* Syed Abbas Ali 85 I. C. 344 (Oudh).

sory note,¹ even though the suit may be barred by limitation on the date of the amendment.² Claim based on acknowledgment, amended claim based on previous original transaction allowed after limitation on the ground that though new, the amended claim was not inconsistent.³ Claim for exclusive possession; amended claim for joint possession.⁴ Claim for possession as transferee from owner; amended claim as heir of the owner who died *pendente lite*.⁵ Claim on a mortgage; amended alternative claim that money was advanced on defendant's fraudulent representation that he was major.⁶ Claim on a registered mortgage-deed; claim on equitable mortgage for a personal decree.⁷ Claim for unpaid purchase money on the ground of vendor's lien; amended claim for the same money as damages for breach of contract.⁸ 'A' Suit for injunction; amended suit for possession after the plaintiff's title had been put in issue and tried.⁹ Claim on a mortgage bond executed by defendants guardian; amended claim for old debts which were the consideration

¹ *Sundar v. Puran*, 10 P. W. R. 1906, 1922 (Lah.) 394 (1); *Indubala v. Lakshminarayan*, 60 C. L. J. 91, 38 C. W. N. 1146; *Kamakshi v. Subbaraya*, 52 I. C. 758 (Mad.) (in this case it was further held that no written application for amendment was necessary); *Varadaraj v. Venkatarama*, 99 I. C. 625, 1927 (Mad.) 378; *Ramchandra v. Keshab*, 61 C. 433, 38 C. W. N. 488, 150 I. C. 982, 1934 (Cal.) 554; *Puranmal v. Kapilmani*, 334 A. L. J. 989; *Abdul Wahab v. Arjarna*, 42 L. W. 574, 1935 (Mad.) 888 but such amendment was not allowed in *Anantaramayya v. Narasomy*, 67 A. L. J. 918 as it was applied for after the conclusion of trial when suit had become time-barred). *Contra* *Burjorji v. Harmusji*, 1932 Bom. 394, 34 Bom. L. R. 643, 137 I. C. 783; *Chellam v. Muthusamy*, 165 I. C. 503, 1936 (Mad.) 632; *Official Assignee v. Kuppuswami*, 165 I. C. 301, 1936 (Mad.) 785.

² *Krishna Prasad v. Ma Aye*, 1936 (Rang.) 508, 165 I. C. 810.

³ *Seth Mangilal v. Zam Singh*, 196 I. C. 190, 1941 (Nag.) 289.

⁴ *In re Purvala*, 12 M. L. T. 159, 15 I. C. 665, (1012) M. W. N. 1116.

⁵ *Inder Deo v. Ramcharitter*, 74 I. C. 971, L. R. 5A. 28, 1923 (All.) 560.

⁶ *Saral Chand v. Mohan Bibi*, 25 C. 371, 2 C. W. N. 201.

⁷ *P. M. Chettyar v. Ma Shwe*, 101 I. C. 628, 6 Bur. L. J. 49, 5 R. 115.

⁸ *Morton v. Woodfall*, 28 Paung. L. R. 15, 9 Lah L. J. 2599, I. C. 770, 8 Lah. 257, 1927 (Lah.) 103.

⁹ *Nabi Baksh v. Angney*, 105 I. C. 784, 4 C. W. N. 975.

of the mortgage.¹ Claim for money borrowed from plaintiff; amended case that loan was advanced by plaintiff's father.² Claim on pronote against the brother of the deceased executant on the ground that defendant had acknowledged the debt, amended claim on the ground that the executant being elder brother executed it for the benefit of the joint family.³ A executed a pronote in favour of B in 1923, afterwards he transferred all his property to his son C who renewed the pronote in 1926. B sued on the later pronote and on finding it inadmissible in evidence sought to amend the plaint so as to base his suit on the pronote of 1923 and to implead A also, held that the amendment did not introduce any new or inconsistent claim and could be allowed.⁴ Similarly, when plaintiff based his suit on two mortgages of 1927 and 1932, the former having been incorporated in the latter, and on defendants pleading invalidity of the latter, sought to base the claim on the former alone, it was held that there was no new case.⁵ Claim for money due on taking accounts of a dissolved partnership; amended claim for share of plaintiff out of the balance which was found on the settlement of account between the parties after dissolution.⁶ Claim based on title as heir to husband who got the property on partition with his brothers; amended claim based on adverse possession against the defendant.⁷

In a suit for partition, the defendants⁸ raised a plea that suit was bad for partial partition as certain items of joint property had been left out. The trial court did not frame any issue that the suit was bad for partial partition. An

¹ S. V. Nallaperumal *v.* R. Ponnayya, 97 I. C. 936, 1926 (Mad.) 1124; Eusoof *v.* Niemeyer, 1940 Rang. L. R. 603.

² Ghulam *v.* Mst. Fateh, 1934 Lah. 974.

³ Sampat *v.* Subhkaran, 196 I. C. 511, 1941 IO. W. N. 112, 1942 (Oudh) 161.

⁴ Ayar Husain *v.* Ram Sarup, 130 I. C. 347, 7 C. W. N. 1195, 1931 Oudh 54; Abdul Wahab *v.* Anjone, 1935 Mad. 888, 42 L. W. 574.

⁵ Kannalal *v.* Bhagwandas, 1949 Nag. 5.

⁶ Radha Kishen *v.* Motilal, 1933 Nag. 82.

⁷ Mangammal *v.* Rangappa, 1935 Mad. 137.

⁸ Mohd. Mustaffa *v.* Abubakar, A. I. R. 1971, S. C. 361.

application was moved in the High Court for amendment. Even though it was held that the properties mentioned in the amendment application were joint of the parties, on appeal it was observed that the High Court took a highly technical view, and the Supreme Court allowed the application for amendment in the interest of justice and remanded the case. Claim for partition; amended claim for possession of plaintiff's share if defendant's story of previous partition is proved.¹ Claim for general account added to a claim for partition of joint family property; amended claim for specific sum of Rs. 10,000 said to have been collected for the family but kept with himself.² Claim for possession by reversioner against widow and daughter; amended claim for declaration of plaintiff's right to succeed after widow's death.³ Claim by one co-obligee of a bond for his share of the money; claim for the whole money.⁴ Suit based on acknowledgment said to be of a cash advance; amended suit based on previous original transactions (after the defendant had himself summoned plaintiff's account books to show that there were previous dealings and no cash was received as alleged by plaintiff at the time of acknowledgment.)⁵ Claim based on custom; amended claim that plaintiff is entitled even if custom is not proved.⁶ Claim based on estoppel by judgment; amended claim based on a plea of estoppel in *pais*.⁷ Claim for rent against three persons in respect of land alleged to have been held at a particular *Jama*; claim that the rental had been split up as a result of transfer by one defendant to others.⁸ While in a suit described in the cause title of the plaint as one for malicious prosecution the words "malicious prosecution," were omitted in

¹ *Gulzari v. Duman*, 97 I. C. 796, 1926 (Lah.) 460, 27 P. L. R. 161.

² *Kunhilakshmi v. Krishna*, 1948 Mad. 460, 1948—1 M. L. J 274. 1948 M. W. N. 245.

³ *Gurditi v. Parmeshri*, 19 I. C. 928, 208 P. L. R. (1914).

⁴ *Raghunath v. Mt. Prana*, 166 I. C. 992, 1937 (Oudh) 290.

⁵ *Sitaram v. Nand Ram*, 78 I. C. 234 (Nag).

⁶ *Md. Ghafor v. Mehdi*, 17 I. C. 326, 12 C. L. L. 253.

⁷ *Zingu v. Mahadeo*, 1948 Nag. 358.

⁸ *Kameshwar v. Mohd. Nasam*, 21 Pat. L. T. 440.

one para of the plaint and the word “malicious” was omitted in another, held the amendment supplying those words did not change the character of the suit.¹ Where a suit for partition was brought by a residuary legatee before the administration was complete and residue was ascertained and the ascertainment of residue was only a formal matter, amendment by adding a prayer for administration was allowed.²

Amendment may be in respect of the form, or the substance, of the pleading, or in respect of the relief claimed, or of the parties to the suit..

As to formal amendment it is needless to say that it should generally be allowed. For example, any defect in signature or verification in a pleading,³ omission of an averment in plaint that notice under S. 80, C. P. C. had been delivered⁴ misdescription of the property in dispute⁵ mistake in the names or addresses of the parties,⁶ mistake in accounts given in the plaint, slips of pen and other errors of a purely formal nature not affecting the merits of the pleadings are treated as mere irregularities and can always be rectified. Thus amendment should be allowed when there is no change in the cause of action but merely a change in the date when the cause of action arose.⁷ A much wider power has been conferred on the court by Sec. 153, C. P. C. than by O. 6, R. 17, C. P. C. in this respect. While the powers under O. 6, R. 17, cannot be exercised after the final determination of the proceeding in the case, those under Sec. 153, can be exercised “at any time,” even years after the final disposal of a case, when any mistake in

Different kinds of amendment or pleadings
(1) Formal amendment

¹ Rohini Kumar *v.* Niaz Mohommad, 1944 (Cal.) 4.

² Jiban Krishna *v.* Jatindranath, 1949 F. C. 64.

³ *Vide* Chap. V. *ante*.

⁴ Governor General *v.* Kasi Ram, 1949 Pat. 268.

⁵ Shankar Lal *v.* Ajmand Khan, 51 I. C. 757, 56 P. W. R. 1919; Dayami *v.* Sankar, A. I. R. 1926 (cal.) 417, 42 C. L. J. 30; Ram Chandra Sahu *v.* Jamna Prasad, 153 I. C. 378, 1935 O. W. N. 31, 1935 (Oudh) 92.

⁶ Md. Yusuf *v.* Himalayan Bank, 18 A. 198 (17 A. 292 overruled); Dayami *v.* Sankar, 1926 (Cal.) 417, 42 C. L. J. 30.

⁷ Alapati *v.* Dasari, 49 M. L. J. 664, 91 I. C. 98, 1926 (Mad.) 128.

the plaint (such as wrong description of property) is detected, e. g., at the time of execution of the decree.¹

(2) Amend-
ment as to
substance

The circumstances under which an amendment in the substance of the pleading can, and those under which it cannot be allowed, have already been discussed above.

(3) Amend-
ments as to
relief

If the amendment in, or addition to, the original relief is such as to change the character of the suit, it shall not be allowed, nor will the court, in its discretion, generally allow it if the application for amendment is made at such a late stage of the suit that it would create a necessity of trying the case *de novo*,² or would be unfair to the other party, as when a suit for possession contested by defendant was decreed on defendant's withdrawing the contest and confessing judgment and the plaintiff wanted to amend the relief in appeal by claiming mesne profits, the court observed that had mesne profits been claimed in the beginning the defendant might not have withdrawn the contest about title.³ In other cases, it may be allowed.⁴ Thus, a mortgagee suing for sale may amend his plaint by asking merely for a money decree,⁵ or a vendor suing for recovery of unpaid purchase money may claim it by enforcement of a charge to bring the suit within 12 years' limitation,⁶ (under Limitation Act of 1908), or a purchaser for suing specific performance may add a prayer for refund of the earnest money in the alternative,⁷ or a plaintiff suing for possession of land sold may be allowed to claim refund of the price on the sale being found to be legally defective,⁸ or

¹ *Satya Narayan v. Purnayya*, 131 I. C. 6, 1931 Mad. 260, 61 M. L. J. 805.

² *Narayana v. Sankuni* 15 M. 255; *Ramananda v. Pulkutti*, 21 M. 288.

³ *Mohalaxmi Bank v. Province of Bengal*, 1942 (Cal.) 371.

⁴ *Kashinath v. Sadasiv*, 20 C. 805; *Sukhdeo v. Lachman*, 24 A. 456.

⁵ *Ibid.* But not in second appeal (*Gajadar v. Ambica*, 41 C. L. J. 540, 1925 (P. C.) 169).

⁶ *Daw Maya v. U Po Maya*, 1934 Rang. 266, 152 I. C. 125.

⁷ *Ibrahim Bhai v. Fletcher*, 21 B. 827.

⁸ *Chaudhri Hakam Ali v. Hashu*, 1938 (Lah.) 244.

a plaintiff suing for declaration may add a prayer for consequential relief.¹ In fact, if, on the facts alleged in the plaint, a plaintiff can seek several reliefs together or in the alternative, and he has sought only some of them, he can amend his plaint by adding a prayer for the others at any stage of the suit,² and a suit would not be dismissed simply because the plaintiff had misconceived the appropriate relief to which he was entitled.³ So, in a suit by one of several co-obligees of a bond for his share only, the plaintiff should be given permission to include the whole claim.⁴ Similarly in an appeal against the whole decree by one out of two defendants, the appellant was allowed to amend the memorandum of appeal by increasing the valuation.⁵ In a suit for wrongful dismissal plaintiff who claimed the pay for a certain period as damages was allowed to amend the plaint so as to claim the amount as pay and not as damages.⁶ In another suit brought for a declaration that plaintiff had never been dismissed or that he still remained in service, when it was held that this relief could not be given, the Federal Court allowed time to amend the plaint so as to claim damages for wrongful dismissal.⁷ Where a minor filed a suit for accounts of a partnership alleging that the release given by his mother was not legally binding as she was not his legal guardian he was allowed to add a definite prayer for a declaration that the deed of release was not valid and binding.⁸ A plaintiff can always reduce the amount claimed

¹ *Ragho v. Vishun*, 5 B. L. R. 329; *Limba v. Rama*, 13 B. 548; *Chomu v. Umma*, 14 M. 46.

² *Nararanam v. Ratnasabapathy*, 28 I. C. 828, 22 M. L. J. 464. (Foll. 36—M. 378); *E. K. S. Chettaryor v. Maung Min*, 1933 Rang. 247.

³ *Abdul Kadir v. Bangaru*, 10 I. C. 260, 1 M. W. N. 270, 9 M. L. J. 429.

⁴ *Raghunath Prasad v. Prana*, 13 Luck. 157, 1937 O. W. N. 163 166 I. C. 992, 1937 (Oudh) 190, 9 Q. O. 360.

⁵ *Sarat Chand Patnaik v. Baidyanath Patnaik*, 1938 P. W. N. 52, 5.

⁶ *Krishna v. Gomathi*, 1945 (Mad.) 33; *Jatindranath v. Corporation of Calcutta*, 1945 (Cal.) 144.

⁷ *Secy. of State v. I. M. Lall*, 1945 (F. C.) 47.

⁸ *Mutha Krishna v. Sankara*, 1934 Mad. 317, 148 I. C. 869, 193 M. W. N. 478.

by him,¹ or amend the relief so as to bring it within the court-fee paid by him.² But the Oudh Chief Court in a case refused to allow a plaintiff in appeal after the arguments had been heard to reduce the valuation in order to save the payment of deficiency in court-fee.³ The Madras High Court has held that where the value of the suit is beyond the pecuniary jurisdiction of the trial court, it cannot entertain an application for cutting down of reliefs so as to bring the suit within its jurisdiction, but should return the plaint for presentation to the proper court. The plaintiff may then present the plaint to the same court again after striking out any relief or reducing the valuation.⁴ The view of the Allahabad High Court is that even when a court has no jurisdiction to try the suit, it has jurisdiction to pass an order allowing an amendment of the plaint.⁵ A plaintiff can also be allowed to increase the valuation if he makes an application at the beginning of the trial,⁶ and within limitation. Where in a suit to declare the mortgage of Tarwad property by the manager invalid, a part of the consideration is found to be binding, the plaintiff can add a relief for redemption of the mortgage on payment of the binding portion of the debt.⁷ But a relief struck out cannot be reintroduced by amendment in appeal.⁸

Where owing to altered circumstances the relief becomes inappropriate court may permit any suitable amendment to the relief. Therefore in a suit for recovery of possession and mesne profits when receiver was appoint-

¹ *Saiyadunnissa Khatun v. Gaibandha Loan Co.*, 172 I. C. 987, 19 (Cal.) 562, 65 C. L. J. 199, 10 R. C. 471.

² *Gaindarmal v. Madanlal*, 1948 East Punjab 30.

³ *Ibn-ul-Hasan v. Usman Ahmad*, 1938 A. W. R. (c. c.) 131, 1938 O. W. N. 1108 and 1141, 178 I. C. 635.

⁴ *Mani v. Sri Paumlu*, 1928 (Mad.) 559, 111 I. c. 737.

⁵ *Kundan Lal v. Sri Narain Lal*, 1957 A. L. J. 738; *Capt. S. V. Daniels v. Gregory Warden Friendly Trust*, 1958 A. L. J. 437.

⁶ *Vinayaga v. Parthasarathy*, 45 I. C. 566, 32 M. L. J. 31, 7 L. 1, W. 415

⁷ *Mani v. Momalan*, 26 I. C. 443 (Madras). (Foll. 15 M. 15, 13 B. 548).

⁸ *Ram Chandra Ganga Bux Firm v. Sundar Lal Singh*, 1930 P. W. N. 455, 1938 (Pat.) 556, 176 I. C. 862, 11 R. P. 120, 19 P. L. T. 916.

ed a prayer for damages for the period after the receiver's appointment could be joined with a prayer for mesne profits for the preceding period.¹

But where specific performance could not be granted as the land had been acquired by Government under Land Acquisition Act, application made in appeal for adding the alternative relief of damages was rejected on the ground that Land Acquisition proceedings were pending when the suit was filed yet plaintiff elected to pursue his remedy of specific performance.²

Where by virtue of the extension of statute to the area in question, the defendant became entitled to new ground of relief, the amendment of the written statement adding such other grounds was allowed.³ An amendment which does not prejudice the defendant or takes him by surprise or does not revive time-barred claim can be allowed.⁴ An amendment of plaint by substituting appropriate reliefs necessitated by subsequent Privy Council decision was allowed.⁵ Where a widow sued for maintenance for herself and for her children but claimed maintenance for herself only, it was held that the court should have directed amendment of relief.⁶

The question of amendment as to parties will be more conveniently discussed in Chapter XII.

The question at what stage an amendment can be allowed does not present much difficulty. Rule 17 of Order 6 permits amendment "*at any stage of the proceedings.*" It may be granted in first appeal⁷ or in second appeal⁸ though only in exceptional circumstances,⁹ even when it was not

(4) Amend-
ment as to
parties

Amend-
ment may
be allowed
at any stage

¹ Gopaldas v. Phulchand, 1946 (Cal.) 357; P. Manga Rao v. C. Kishan Rai I. L. R. (1963) A. P. 931.

² Mohammad Abdul Jabbar v. Lalmia, 1947 Nag. 254.

³ Sukya v. Mohd. Ishaque, 1950 Bom. 236.

⁴ Akhi Ramayan Das Gupta v. B. N. Biswas, 1951 Cal. 472.

⁵ Someshwar Banerji v. Union of India, 85 C. L. J. 364.

⁶ Jai Krishna v. Mt. Ram Kakhi, 1950 H. P. 12.

⁷ Section 107 (2), C. P. C.

⁸ Section 108, C. P. C.

⁹ Mahadei v. Bhau, 50 I. C. 180, 6 O. L. J. 55.

asked for in the trial court,¹ and even when it was allowed by the original court but the opportunity was not availed of.² Where, however, a defect was pointed out by the defendant in two courts, but the plaintiff did not apply for amendment, his application in second appeal was rejected.³ Where in the trial court the defendant objected that plaintiff could not sue in his personal capacity but must sue in a representative capacity but the plaintiff persisted in the course he had adopted, permission to amend the plaint was refused by the appellate court.⁴ In another case, however, when it was found that the previous suit was framed in the *bona fide* belief that consequential relief was not open, amendment to include a consequential relief was allowed in spite of the fact that the defendant had taken the objection at the earliest stage that the suit offended against Sec. 42, Specific Relief Act.⁵ Where a claim was grossly over valued and this was not *bona fide*, amendment in appeal was refused.⁶ In one case amendment was allowed in appeal before the Privy Council.⁷ In another case of damages by a principal against his agent for acting contrary to instructions and fraudulently the case of fraud was given up but plaintiff was allowed in appeal to introduce a new ground of relief under Sec. 214, Contract Act by way of amendment.⁸ But it must not be forgotten that the power is discretionary

¹ But *see* Rameshwar *v.* Lateshwar, 36 C. 481 and Mehtab Ali *v.* Imdad Ali, 59 P. L. R. 1916, 30 I. C. 387, 91 P. W. R. 1915, in which it was refused by Appellate Court because it was not applied for in the original Court.

² Kishandas *v.* Rachhapa, 33 B. 644.

³ Radhabindu *v.* Naba Kishore, 94 I. C. 244, 30 C. W. N. 4153, 1926 (Cal.) 568; Parvathi *v.* Sundaram, 97 I. C. 127, A. I. R. 1926 (Mad.) 988; Tejlal *v.* Godubai, 1944 (Bom.) 158.

⁴ Madina *v.* Ismail, 1940 (Mad.) 789; Sri Sri Raja *v.* The Borrea Coal Co., 1946 (Cal.) 123.

⁵ Gurbugappa *v.* Sahu Rammappa, 131 I. C. 886, 33 Bom. L. R. 141, 931 (Bom.) 218.

⁶ Achhuta *v.* Krishna, 1935 Mad. 879.

⁷ Mohammad Zahoor Ali *v.* Ratta Koer, 11 M. I. A. 4 (486).

⁸ Philips *v.* Barnes, 1938 M. W. N. 156, 10 R. P. C. 114, 1937 (P. C.) 314, 171 I. C. 487 P. C.

and therefore such application should generally be made with reasonable promptitude, and, if possible, before the case is set down for hearing, for, otherwise, it may be refused, because the grounds for refusal chiefly arise at that stage. For instance, amendments have been refused by Appellate Courts when they changed the character of the suit and involved trial of new issues on new evidence, and the case could not be decided on the material on record¹ and when the plaintiff had argued in the lower court that the case was not properly framed and presented.² In certain cases, applications have been refused merely on the ground that they were presented at a very late stage³ though that itself is no ground for rejecting an amendment, unless there are other considerations,⁴ e. g., when the nature of the suit is sought to be altered,⁵ or when the amendment seems to be entirely an afterthought, or when the case originally set up appears to fail, in which case prejudice to the defendant is clear, or when it is open to the plaintiff to bring a fresh suit for obtaining the relief sought by the amendment.⁶ But the fact that the amendment would mean the trial of a case *de novo* is by itself no ground for refusing it, if it is otherwise a proper and necessary one.⁷ In a suit for redemption which was ready for judgment, the plaintiff applied stating that he had filed it in ignorance of facts and asked to be allowed to amend the plaint so as to claim possession on the allegation that the mortgage was invalid, being

¹ Mehtab Ali *v.* Imdad Ali, 30 I. C. 387, 59 P. L. R. 1916, 91 P. W. R. 1916; Nag. Tun *v.* Nag. Kna, 12 I. C. 200, 4 Bur. L. T. 244; Bajrang *v.* Brahmadat, 52 I. C. 849, 1923 (Lah.) 675; Maung Ba *v.* Maung Than, 1926 (Rang.) 49, 3 Rang. 383; Dhannulal *v.* Kuldip Narain, 1940 (Pat.) 88, 186 I. C. 852 Fazal; Bibi *v.* Abdul Rahim, 42 P. L. R. 479.

² Chhatrapat Singh *v.* Maharaja Bahadur Sindha, 39 I. C. 861, (Cal.)

³ Sarkari *v.* Jogha, 3 Lah. L. J. 437; Baliram *v.* Ganpat, 37 I. C. 906; Chainu *v.* Manbodh, 45 I. C. 894.

⁴ Devi Dayal *v.* Wazir Chand, 61 I. C. 328, 34 P. L. R. 144; Hardial Singh *v.* Sardarni Jaswant Kr., 1943 (Lah.) 159.

⁵ Askari *v.* Ratan Lal, 1934 Oudh 178, 148 I. C. 1044, 11 C. W. N. 453, Tipan *v.* Secretary of State, 154 I. C. 103, 1935 (Pat.) 86.

⁶ Daw Pan *v.* Ma Shwe, 1935 (Rang.) 88.

⁷ Bulaffi *v.* Jugal Kishore, 1926 (Oudh) 718.

without consideration and necessity. It was held that the application should in this case have been refused.¹ Similarly, in a suit contesting an adoption plaintiff applied, after a considerable evidence had been taken, to amend the plaint so as to allege that the parties did not recognize the custom of adoption. The application was refused.² But where on the facts appearing from the plaintiff's evidence a new defence of law arose, the defendant was allowed to take such a defence by amending his written statement even after the close of plaintiff's evidence.³ In a suit for specific performance of a contract defendant was not allowed, after the case had remained pending for over a year, to raise the new defence that the contract of sale was induced by misrepresentation of the plaintiff.⁴ In a suit for possession on the allegation that defendant took wrongful possession two years ago, the court found that defendant had been in long possession. The plaintiff was not allowed to amend the plaint in second appeal so as to allege that the defendant's possession before two years was permissive as that would have changed the onus from plaintiff to defendant.⁵ In another case plaintiff was not allowed to amend his plaint in second appeal so as to include a prayer based on a new cause of action which on that date had become barred by limitation.⁶ In a case plaintiff based his suit on the allegation that the defendant was a licensee, defendant pleaded title by adverse possession and the suit was dismissed, the court holding that the defendant was not a licensee; the plaintiff was not allowed to amend his plaint in appeal so as to base the suit on the ground that the defendant was a trespasser.⁷ In a suit for declaration plaintiff was allowed in second appeal to add a prayer for possession.⁸ The

¹ *Tohlu Mal v. Buta*, 67 I. C. 132, 3 Lah. L. J. 184.

² *Shah Deo Narayan v. Kusum Kumari*, 46 I. C. 929, 5 Pat. L. J. 164.

³ *Sulaiman v. Tan Hwi*, 7 R. 800, 121 I. C. 803, 1930 (Rang.) 140.

⁴ *Parshottam v. Taimur Ali*, 1945 (All.) 29.

⁵ *Rahella v. Waziran*, 109 I. C. 320, 9 L. L. J. 334, 1928 (Lah.) 32.

⁶ *Vedagiri v. Ovveti*, 110 I. C. 775, 1928 (Mad.) 828.

⁷ *Khanu v. Panjal*, 1933 Sind 279, 146 I. C. 777.

⁸ *Shankar v. Puttu*, 1932 Bom. 175, 34 Bom. L. R. 125, 139 I. C. 678.

court disallowed an amendment asked for in Letters Patent Appeal for conversion of a suit for specific performance into one for compensation or damages.¹ In another case in which a suit for sale on mortgage on the allegation that the plaintiff was usufructuary mortgagee and had been dispossessed was dismissed on the ground that the mortgage was against statute, the same High Court disallowed in second appeal an amendment to enable plaintiff to claim ownership by prescriptive right.² Amendment was refused in second appeal³ when it was found that the plaintiff had made deliberately false allegations in the plaint and the suit in amended form would be barred by limitation at that stage.

In a Madras case, a sister of the deceased had challenged the adoption by the widow but compromised the case on taking a portion of the property. Several years later the sister's son brought a suit for a declaration of the invalidity of the adoption, stating that the compromise by his mother was not binding on him as it was brought about by fraud. The plaintiff's application for including a prayer for setting aside the compromise and order based on it was allowed in appeal by the High Court even after limitation, on the ground that the plaintiff had mentioned all necessary facts constituting the cause of action in the plaint and therefore no new case was set up.⁴

In another case the plaintiff sued his uncle for partition on the allegation that the latter had adopted him and on defendant's death his widow and daughter who were substituted set up a will executed by him. The plaintiff was allowed to amend the relief by claiming possession on the ground that the will was not genuine.⁵

In a suit for damages for libel the defendant traversed all the plaint allegations specifically except the publication

¹ *Kubad Bai v. Guhi*, 1940 (Pat.) 92, 187 I. C. 198.

² *Maksudanlal v. Niranjana*, 1940 (Pat.) 494, 187 I. C. 266.

³ *Prahlad Mohanti v. Prahlad Chandra Nath*, 1944 (Patna) 276.

⁴ *Krishna Ayyar v. Gamathi Ammal*, 1945 (Mad.) 33.

⁵ *Methi v. Bhimuder*, 1946 (Mad.) 497.

which was considered to have been admitted by implication. After the issues, the defendant wanted to amend the written statement by denying the publication, but the application was disallowed, as a defendant who, deliberately and under no mistake or misapprehension, admitted a fact, “cannot be allowed to change front”.¹ In a similar suit for libel, the plea of privilege was not allowed to be added at the commencement of the trial, as being unfair to the plaintiff.

Amend-
ment due
to subse-
quent
event

Though ordinarily suits are decided with reference to the dates on which they are instituted, if events happen after the institution of the suit with reference to which the rights of the parties are to be determined, amendments are allowed to enable the court to take such events into account to bring their decisions in conformity with the events as they stand on the date of the decree.³ There is nothing to prevent amendment so as to base a claim on a cause of action arising after institution of the suit,⁴ and where the original relief has, by change of circumstances, become inappropriate, or it is necessary to have a decision of the court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, a plaint may be allowed to be amended so as to base a claim on events happening after the institution of the suit.⁵ For example, if pending a suit for declaration, the defendant takes possession,⁶ or plaintiff becomes entitled to possession by death of one of the defendants,⁷ a plaintiff may amend the plaint by adding a prayer for possession instead of bringing another suit or if, pending a suit for partition by a plaintiff against his two brothers,

¹ *L. A. Subramania v. R. H. Hitchcock*, 85 I. C. 900 (Mad.)

² *Lala Lajpat Rai v. Englishman*, 13 C. W. N. 895, 36 C. 883.

³ *Mulla's C. P. C.*, 12 ed. p. 612.

⁴ *Nur Khatun v. Sumar Sawayo*, 31 I. C. 7, 9 S. L. R. 61; *Mumtaz v. Naurang*, 3 Lah L. J. 227; *Ghulam Fatima v. Rahman*, 50 I. 270 127 P. R. 1919; *Tara Chand v. Abdul Ahad*, 67 I. C. 894 (Lah.). *Abdul Karim v.*

⁵ *Nurmian v. Ambica*, 44 C. 97. *Ramshivar Dayal v. Pacham Kumar* A. I. R. 1970 Raj. 77 at 79.

⁶ *Hamid Mriza v. Ahmad Mirza*, 9 O. L. J. 359, 68, 1922 (Oudh). 266, 4 U. P. R. (o. c.) 89.

⁷ *Roshana Singh v. Durag Singh*, 124 I. C. 244 (Nag.)

one of the brothers dies, the plaintiff can amend his plaint and claim a half share instead of one-third. So where a suit for declaration of invalidity of a widow's transfer was dismissed on the ground of limitation, and the widow died pending appeal the Appellate Court allowed the plaintiff to convert his suit, into one for possession.¹ So, where money became payable immediately after the suit and the defence was that the suit was premature, a decree was passed without amendment,² but in a similar case the Allahabad High Court refused the plaintiff's prayer even to amend the plaint.³ In a case it was found that the plaintiff had no title on the date of suit, but one accrued to him during the pendency of the suit, he was allowed to amend the plaint.⁴ So, when a plaintiff sued for redemption of a mortgage made by a Hindu widow on the allegation that he was her adopted son, and when the adoption was questioned by the mortgagee he obtained a conveyance of the equity of redemption from the reversionary heir, he was allowed to amend the plaint by setting up this new title, as the suit was still within time and there was no prejudice to the defendant.⁵ Similarly when plaintiff sued for a declaration that he was entitled to an office of a temple according to turns, and the year for which he was entitled to possession expired during the pendency of the suit, and another year for which he became entitled ensued, the plaintiff was allowed amendment so as to get possession during such latter year.⁶ But an amendment of this nature cannot be allowed where it may amount to a change of jurisdiction, or there is great delay in making the application, or if a fresh inquiry into other facts becomes

¹ *Sreeramulu v. Hanumayya*, 1211 I. C. 208, 1930 (Mad.) 47.

² *Subbaraya v. Nachiar*, (1918) M. W. N. 199, 44 I. C. 863, 7 L. W. 403; *Kanshiram v. Jaimal*, 75 I. C. 562; *S. K. Nagoor v. Haji*, 4 Burma L. J. 110, 1925 (Rang.) 264; *Vaddadi v. Daddi*, 93 I. C. 955, 1926 (Mad.) 377, 1926 M. W. N. 9.

³ *Jugal Kishore v. Chari & Co.*, 101 I. C. 643, 25 A. L. J. 385.

⁴ *Pendekkallu v. Pendekkallu*, 75 I. C. 112 (Mad.).

⁵ *Dorasami v. Chinnia*, 22 M. L. T. 538, (1918) M. W. N. 89, 34 M. L. J. 258, 43 I. C. 560, 7 L. W. 335.

⁶ *Lakshmiah v. Krishnaswami*, 1935 M. W. N. 56, 1935 (Mad.) 286, 41 L. W. 429.

necessary,¹ Nor can an amendment be allowed to introduce a cause of action which arose during the pendency of the suit when the effect will be to alter the nature of the suit² A cause of action cannot, however, in any case arise from the suit itself, e.g., in a suit for ejectment, a disclaimer of the landlord's title in the defendant's pleading cannot give a cause of action for that suit.³

As to how far a court is justified in taking cognizance of subsequent events when passing its decree, *see* Chapter VII.

Amend-
ment and
Limitation

When an amendment is allowed the suit could not be considered to have been brought on the date of amendment and the date of institution will be the determining factor for the purposes of limitation. But amendment by introducing a new cause of action cannot be allowed if the cause of action has become barred by limitation.⁴ So, when plaintiff sued for possession as reversioner of the last male holder and after limitation sought to claim the property as the nearest heir of the widow stating that the property was her *stridham*, the amendment was disallowed.⁵ An amendment allowing a fresh relief which has become barred will not be allowed, except in very special circumstances.⁶ The Supreme Court has held that though as a rule amendments are not allowed if a fresh suit on the amended claim would be barred by limitation on the date of the amendment,

¹ Vallaru *v.* Sasapu, 1926 Mad. 6, 49 M. L. J. 479, 90 I. C. 881; Roshan Singh *v.* Durag Singh, 124 I. C. 244 (Nag.).

² Sobhraj *v.* F. O. Variomati, 1942 (Sindh) 4.

³ Balkaran *v.* Gangadin, 36 A. 370; Gulrannmal *v.* Panna Mal. 8 S. L. R. 69; Bisheshar *v.* Gobind, 12 A. L. J. 833; Mir Haider *v.* Jai Karan, 122 I. C. 271.

⁴ Parannath *v.* Madhu, 13 C. 96; Vithu *v.* Dhondi, 15 B. 407; Ambabai *v.* Bhau, 20 B. 759; Gulzar *v.* Kalyan, 15 A. 399, (But *see* 8B. 228 and 36 C. 927); Macleod & Co. *v.* Ivan Jones, 1926 (Cal.) 189, 87 I. C. 218; Ram Karan *v.* Baldeo, 1938 (Pat.) 44, 173 I. C. 292. Harish Chandra Bajpai *v.* Triloki Singh A. I. R. 1957 S. C. 444. & Ram Dayal *v.* Brijraj Singh A. I. R. 1970 S. C. 110.

⁵ Vaithilingam *v.* Kandaswami, 132 I. C. 311, 1931 (Mad.) 1, 60 M. L. J. 713.

⁶ Nemasa *v.* Ramkrishna, 10 N. L. R. 32, 23, I. C. 165.

that is only a factor to be taken into account in exercise of the discretion as to whether the amendment should be ordered or not. If the court feels that the amendment is required in the interest of justice, its power to order it is not affected by the fact that the amended claim is barred by limitation on the date of the amendment.¹ When an entirely new cause of action is, however, added by the amendment, the suit should be considered as having been filed when it is amended. A defendant is always entitled to plead after a plaint is amended that the suit is barred by limitation in its amended form. Such a plea cannot be ignored merely because the amendment has been allowed.² Where the plaintiff in a preemption suit deliberately omitted to include some property he was not allowed to include it after limitation as there was no special reason.³ Formal amendments, e. g., by correcting the description of the property or of the defendant or correcting any defect in signature or verification or furnishing particulars can, however, be always made, even after the period of limitation for the suit has expired,⁴ but correcting the description means that the identity of the person described is not changed, and where identity is changed, amendment cannot be made after limitation.⁵ Suit in firm's name was allowed to be changed in manager's personal name beyond limitation.⁶ An amendment by adding to the name of the defendant a description of him as a *Shebait* of the deity who was the real necessary party was allowed.⁷

If, as a result of the proposed amendment, the valuation of the subject-matter is increased and additional court

Amendment and Court fees

¹ L. J. Leach & Co. Ltd. v. M/s Jardine Skinner & Co. 1957 S. C. 357.

² Gordhandas v. Gokal Khatoor, 96 I. C. 79, 1926 (Sindh) 246.

³ Sheo Narayan v. Ram Khilawan, 1945 (Oudh) 135.

⁴ Jodhi Rai v. Basdeo, 8 A. L. J. 817; Mohd. Sadiq v. Abdul Majid, A. L. J. 636; Nanji Bhai v. Popatlal, 34 Bom. L. R. 628, 138 L. C. 797, 1932 (Bom.) 367; Ram Nath v. Mohanlal, 181 I. C. 106, 1993 (Nag.) 23.

⁵ Mangharam v. Haji, 1939 (Sind) 172, 182 I. C. 881.

⁶ Jai Jai Ram v. National Building. A. I. R. 1969 S. C. 1267.

⁷ Sri Gouri Shankar v. Mangal Mahton, 1946 (Pat.) 440.

fee becomes necessary the plaintiff is bound to pay it, but it is not necessary to tender it with the application for amendment.¹ It can be paid after the amendment has been made, and as a matter of fact, the court has no power to insist on its payment before the amendment has actually been carried out, because it is only after the amendment that the fee originally paid becomes deficient.

How is
amendment
made

In cases in which the court orders an amendment either on the application of the opposite party, or of its own motion, either under O. 6, R. 16, or under the second sentence of O. 6, R. 17 it ordinarily causes the amendment to be made in the pleading by one of its officers, under the signature of the presiding judge. When a party obtains leave to amend his own pleading under O. 6, R. 17, he should, after leave has been granted, generally make the amendment himself in court, but, in proper cases, e. g., when the party is a *pardanashin* lady and the amendment requires her signature or verification, the court may return the pleading to his pleader for amendment within a fixed time.

Under the old Code of 1882, no application for leave to amend a pleading was required, but the court either returned a plaint for amendment or itself made such amendments as it considered necessary. If, therefore, a party wanted to amend his plaint, he had to move the court to make the amendment, and if the court allowed the application, the amendment used to be made by one of its officers and attested by the signature of the judge. Though O. 6, R. 17, which is a reproduction of the English rule, has been in force so long, the practice in the courts, in some places still continues the same. A party never applies for leave to amend his pleading, but he moves the court to make the amendment which, on the application being allowed, is made by an officer of the court. Though there seems to be no substantial harm in this, yet it is not in strict

¹ Muhammad Zafar *v.* Kaniz Saida, 94 I. C. 875 (Oudh).

conformity with law. When a pleading is returned for amendment to a party he should not file a new and amended pleading but should file the same pleading again, after making the necessary amendments. If the amendments are considerable, and cannot be conveniently made in the original pleading, a new pleading in the amended form may be drawn up and attached to the old pleading. The latter may be struck out but one should not forget to file it. The party should, in such cases, be careful not to make any amendment other than that for which he has obtained leave or which he has been ordered to make. After amendment pleadings as they stand, and not as they stood before amendment, should be taken into consideration.¹

When a plaint is amended, the court should give an opportunity to the defendant to file an additional written statement, and if new issues arise, an opportunity to the parties to adduce evidence on those new issues. Similarly, when a written statement is allowed to be amended and a new plea is added the plaintiff should have opportunity to meet the new plea.² But if the amendment is of a purely formal nature it should not give the other party an opportunity to reopen his case by introducing new pleas.³ When an amendment is ordered by the Appellate Court, necessitating new issues and new evidence, the Appellate Court will generally remand the case⁴ to the lower court for carrying out the amendment and retrying the case, though it can have the amendment made in its own court, if it so chooses.⁵

Amendment is allowed on "such terms as may be just." Under the old Code of 1882, courts could only impose costs but since 1908 they have been allowed to impose any other terms they think just, and the rule has been brought into

Terms on which amendment is allowed

¹ Prabhu Narain *v.* Jitendra Mohan, 1948 Oudh 307.

² Tadiparti *v.* Maddukuri, 24 I. C. 822; Prasapathi *v.* Raja Vachavaji 29 M. L. J. 53.

³ Ganba *v.* Ganpatsao, 1937 (Nag.) 376.

⁴ Uzir *v.* Saivai, 20 C. W. N. 54.

⁵ Nripendranath *v.* Hemanta, 63 I. C. 701. (Cal.)

conformity with the English rule on the point.¹ Payment of costs is generally the condition on which amendment is allowed, which means costs of the application and of any adjournment caused thereby, or on account of the amendment, and also the costs of any evidence or pleading rendered nugatory by the amendment.² Costs incurred up to the date of amendment may in proper cases be ordered to be paid.³ A party accepting the cost without demur but not if he accepts under protest,⁴ is estopped from challenging the order of amendment.⁵

Failure to
amend

When a party obtains leave to amend his pleading he must amend it within such time as is allowed by the court when giving leave to amend. The court has, however power to extend the time. If the party obtaining leave to amend his pleading fails to amend it within such time, he shall not be permitted to amend it afterwards, unless he can obtain an extension of time from the court,⁶ but the failure does not render the suit liable to dismissal.⁷

The consequence of failure to amend the pleading, therefore, is that the case will go to trial on the original pleading, but the suit cannot be dismissed, nor can the pleading be rejected or struck out simply on the ground of failure of a party to amend the pleading within the time allowed to him.⁸ A court has no power to compel a plaintiff to amend his plaint. If a plaintiff does not ask for leave to amend a defective plaint, and if the court finds that the suit cannot proceed on the plaint it can dismiss the suit.⁹ In

¹ *King v. Cooke*, 1 Ch. D. 57; see *Gannaji v. Manakji*, 34 B. 250.

² *In re Truefort*, 53 L. T. 498.

³ *Jacobs v. Schmalz*, 62 L. T. 14.

⁴ *Shri Ram Sundermal v. Gouri Shanker*, 1961 Bom. 137.

⁵ *Dist. Council of Wardha v. Anna*, 197 I. C. 76, 1941 (Nag.) 273; *Kannalal v. Bhagwandas*, 1949 Nag. 5; *Korvati Subbamma v. Pinna Pureddy*, 1958 A. P. 483; *Ramcharan Mahto v. Custodian*, 1964 Pat. 275.

⁶ O. 6. r. 18 C. P. C.

⁷ *Rahmatulla v. Karimu*, 20 Lah. L. T. 145.

⁸ *Murlidhar v. Narain Das*, 19 I. C. 472, 169 P. L. R. 1913, 107 P. W. R. 1912; *Feroz Shah v. Kalu Ram*, 164 I. C. 181, 1936 (Pesh.) 155.

⁹ *Ujagar v. Ram Ditta*, 111 I. C. 787 (Lah.)

a case, the application for amendment was read as part of the plaint and as the defendant did not raise any objection to this in the beginning, the objection was considered as waived.¹

But it is only when leave to amend has been obtained under Order 6, Rule 17, C. P. C. that a party cannot amend his pleading after the time allowed by the court. When the High Court held that a plaint did not specify the property in suit as required by Section 47, Chota Nagpore Landlord and Tenants Procedure Act and sent it to the lower court for amendment, amendment made beyond 14 days was considered to be not improper, as the order was not passed under Order 6, Rule 17, C. P. C.²

What would be the consequence of a party failing to amend a pleading which has been returned to him for amendment? The Code is silent on this point. In the old Code there was an express provision for return of a plaint, and in case a plaintiff failed to amend the plaint within the time allowed to him, the plaint could be rejected. As, however, an order for return of plaint can now be made only under Section 151, C. P. C., under the same section the court can punish disobedience of its order by rejecting the plaint or dismissing the suit, if the person in default is the plaintiff, or by striking out the defence, if he is the defendant. In a case in Madras, the Court rejected the plaint on the plaintiff's failing to amend it, and the High Court held that the order of rejection fell under Order 7, Rule 11 clause (c)³ but there seems to be some mistake in the report as clause (c) can have no application to such a case.

¹ Gaj Kumar Chand *v.* Lachman Ram, 10 I. C. 503, 14 C. L. R. 627.

² Madan Mohan *v.* Maharaja of Chhota Nagpore, 19 C. W. N. 200, 22 I. C. 778.

³ Lomada Pedda Subayya *v.* Settupalli, 1925 (Mad.) 646.

CHAPTER XI

Frame of Suit

After dealing with the principles of pleadings in the foregoing Chapters and some other material questions in this regard, the other questions of practical importance are dealt with in this and subsequent Chapter. They are how to frame a suit, who should be joined as parties, whether the suit should be based on one cause of action only or more than one cause of action can be joined against the same defendant or if there are more than one plaintiff or more than one defendant, how to avoid misjoinder of parties and causes of action or multifariousness. For all these matters the rules contained in Or. I, and Or. II. C. P. C. provide the guide lines while the judicial pronouncements show the way of their application.

Before drafting a plaint, a pleader should carefully consider how he should frame his suit. The first thing which he has particularly to consider is the cause of action for the suit which he is going to institute. If there is a single cause of action and more than one relief can be prayed for, he should pray for all of them, and, if he relinquishes any, he must be prepared to do that once for all. If there are several causes of action, he must apply his mind to consider whether he can bring a joint suit in respect of all of them or must bring separate suits. He has also to consider how best he can frame his suit, so that it may not offend against the rules, and may at the same time, save his client from unnecessary future litigation. Then he has to consider what persons he must implead as defendants and whom he cannot legally implead. If there are several plaintiffs, he has to consider whether they can all sue jointly or not. He should not leave out any person who is a necessary or a proper defendant.

If he does so the suit would not be properly framed. The Supreme Court in a recent case filed by the mortgagee for declaration against the transferee, without impleading the mortgagor's son, who made the transfer, held that the suit was not properly framed as all the parties were not before the court. The mortgagor's son "If he was not a necessary party, he was at least a proper party¹."

The first principle to be remembered in framing a suit is, that, as far as practicable, it should be so framed as to afford ground for final decision of the "subjects in dispute" and to prevent further litigation concerning them.² This is done by bringing forward the whole case as to the matter of litigation or the question of right involved in the suit, as the words "*Subjects in dispute*" in Order 2, Rule 1 do not mean the *corpus* or subject-matter of the claim, but they mean the "jural relation between the parties to the suit for the determination of which the suit is brought."³ It is not, therefore, intended that a plaintiff should necessarily unite all the causes of action which he may have against the defendant in respect of the *corpus* of the suit, though, of course, he is at liberty to do so, if he likes.⁴ If a plaintiff can claim a property on more than one separate ground, he should allege all those grounds in the plaint, and, if he does not, the dismissal of his suit on the ground or grounds urged, will bar a separate suit on the other grounds (Sec. 11, Exp. IV, C. P. C.). Thus, where a suit for possession as reversioner on the ground of a certain relationship was dismissed, a subsequent suit for possession as reversioner on the ground of another relationship was held barred⁵ as the plaintiff was bound to include in the former suit all the different grounds on which he claimed to be a reversionary heir.

First principle of the frame of suit

The second rule of a similar nature embodied in O. 2, Splitting up of a cause of action

¹ Jugraj Singh and others v. Jaswant Singh and others, A. I. R. 1971, S. C. 761.

² O. 2. R. 1.

³ Ramaswami v. Vythinatha, 26 M. 760 (766).

⁴ U. Po Ko v. U. Po. Thein, 161 I. C. 820, 1936 Rang. 167.

⁵ Masilamania v. Thiruvengadam, 31 M. 485.

R. 2, C. P. C. is directed against splitting up of a cause of action. The object of this rule is that a defendant should not be dragged to court unnecessarily and that there may not be multiplicity of suits. It requires that every suit shall include the whole of the claim which a plaintiff is entitled to make in respect of a cause of action¹ but it is not necessary that he should include in one suit every claim or every cause of action which a plaintiff might have against the defendant² though in respect of the same subject-matter³. The penalty of violating this rule is not that a suit not so framed is liable to be dismissed or an amendment would be ordered, but only this, that the plaintiff shall not be at liberty to bring another suit for the portion so omitted or relinquished in the first suit. Thus the omission will bar only the remedy of the plaintiff and not his right.⁴ It is immaterial for the application of this penalty whether the omission was intentional or accidental,⁵ or that after having omitted to include the claim the plaintiff made an unsuccessful attempt to include it by seeking amendment of the plaint.⁶ The omission will not bar a second suit when the plaintiff was not, at the time of the former suit, aware of his right to the claim omitted by him.⁷ Nor will the rule be attracted when the cause of action has been split by agreement between the parties.⁸ A subsequent suit in respect of a claim, which

¹ O. 2, R. 2.

² *Kulada Pd. v. Khudiram*, 70 I. C. 187, 27 C. W. N. 678, 37 C. L. J. 545; *Manmathanath v. Jagat Ram*, 59 I. C. 517 (Cal.); *Parashram v. Sadasheo*, 1936 (Nag.) 268.

³ *Rengier v. Ramia*, 1930 (Mad.) 264.

⁴ *Punjab National Bank v. Official Receiver*, 188 I. C. 833, 1940 Lah. 166. *Ahmad Jaman Khan v. Beldeo Das* A. I. R. 1933 A. 228.

⁵ *Buzloor Ruheem v. Shumsoonnissa*, 11 M. I. A. 551; *Syed Abdulla v. Harkishore Singh*, 2 C. L. R. 490; *Ram Prasad v. Radha Pande*, 21 P. L. T. 790.

⁶ *Mohammad Khalil v. Mahbubali*, 1949 P. C. 78, 1948 A. L. J. 574.

⁷ *Amanat Bibi v. Imdad Husain*, 15 C. 800 (p. c.); *Batual Kuwar v. Munni Lal*, 32 A. 625, 7 A. L. J. 734; *Gora Chand v. Basanta*, 15 C. L. J. 238; *Dasarthy v. Palala*, 45 I. C. 969, 24 M. L. T. 311, 7 L. W. 557, (1918) M. W. N. 427; *Yarlagada v. Pulgadda*, 103 I. C. 74 (Mad.); *Venkatachandi-kamba v. Viswanadhammaya*, 164 I. C. 717, 1936 Mad. 699; *Bhagwan Das v. Tajunnisa*, 1941 (All.) 217, 194 I. C. 586.

⁸ *Phool Chand v. Kamta Pd.* 1963 All W.R. 619.

was barred by time, when earlier suit was filed, but became within time later on by an Act, will not be hit by O. 2 R. 2.¹ It is, therefore, necessary for a pleader carefully to consider the whole claim which his client can make in respect of a cause of action before drafting the plaint, and unless the plaintiff elects to relinquish any portion of it, to advance the whole of it in his plaint. For this purpose, it is necessary to understand what the term "cause of action" exactly means.

The Privy Council summarised the law on the point as follows :

What is
cause of
action?

(1) The correct test in cases falling under Or. 2, R. 2 is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the Judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.²

Every such fact and circumstance which entitles the plaintiff to the relief claimed is a part of the cause of action,³ but the term does not include every piece of evidence which is necessary to prove such fact.⁴ It must be carefully distin-

¹ National Security Assurance Co. v. S. N. Jaggi A. I. R. 1971 All. 421.

² Mohammad Khalil v. Mahbub Ali, 1949 P. C. 78; Jokhi Ram v. Sardar Singh, 1955 A. L. J. 579.

³ Beni Madho v. Sarat Chandra, 1937 (Cal.) 643.

⁴ Sheokumar v. Bechan Singh, 1940 (Pat.) 76.

guished from the transaction which gave rise to it, for the same transaction may give rise to several causes of action and the law does not require that *all* such causes of action must be joined in one suit.¹ Take an example. By a collision with the defendant's van, the plaintiff's cab is damaged and the plaintiff also receives severe bodily injuries. Though the transaction (*viz.*, the collision) is one, two causes of action have accrued to the plaintiff, *viz.*, (1) damage to his cab, and (2) injury to his body. He is not bound to join both of them in one suit, (though he is at liberty to do so, if he likes) and the suit for compensation for damage to the cab will not bar a second suit for damage for bodily injury. But the plaintiff cannot be permitted to bring one suit in respect of damage to the wheels of his cab and another in respect of damage to the axle, or one suit for injury to hands and another suit for injury to his legs. One and the same transaction may give rise to several distinct causes of action and plaintiff may bring as many separate suits as there are causes of action, but not more than one suit can be brought in respect of single cause of action. The test is, to inquire, after setting out the facts constituting the cause of action for the particular claim whether on those facts it is open to the plaintiff to make any other claim, and whether the facts which would be required to establish the claim to be preferred would as well substantiate another claim.² If the answer is in the affirmative, the pleader should warn the plaintiff of his right and of the consequence of the omission.

It must, however, be remembered that, though separate suits can be brought in respect of separate causes of action, it is always advisable to join in one suit all such causes of action against the defendant as can be legally joined. In the event of separate suits being brought, it is submitted, that it would be right for the court to deprive the plaintiff

¹ *Shridhar v. Godulal*, 41 Bom. L. R. 1223, 1940 (Bom.) 20, 186 I. C. 609; *Amar Singh v. Tulsi Ram*, 1949 Nag. 195, *Arunachalam Pilai v. Vellamma* (1967) 2 M. L. J. 490.

² *Mohammad Khalil v. Mahbub Ali*, 1949 P. C. 78.

of costs in the second or subsequent suit on the ground that the time of the court had been wasted and unnecessary expense incurred; and this is a principle of general application in all cases where all the matters in controversy between the parties can be settled in one suit.

The following claims have been held to arise from the same cause of action : Claim by a *Zamindar* for cancellation of a mortgage of occupancy holding, claim by him for possession of the holding.¹ Claim for redemption on the ground that the mortgagee in possession has received more than the amount of the mortgage; claim for recovery of surplus.² The plaintiff sent one consignment of Bidies through Ralways. A part of the consignment was not delivered, while a part was delivered in damaged condition. A suit was brought for damaged goods i.e. short delivery. Subsequent suit for non-delivery was held barred by O. 2 R. 2 C. P. C. It was treated as intentional relinquishment of claim.³ Suit for specific performance, suit for recovery of deposit money.⁴ Suit for specific performance, suit for money paid on a consideration which has failed.⁵ Suit for partition basing title to half share, suit for possession of entire property after dismissal of the first suit on a technical ground.⁶ So also suit for partition of joint family property and subsequent suit for partition of an item omitted in the former suit.⁷ But in case of tenants in common, cause of action for partition of each property is different.⁸

Illustrations :
(1) Of the same cause of action

Upon settlement of accounts between the parties the defendants gave the plaintiff an order from their agents for payment of Rs. 2,500 and promised to pay the balance

¹ Sarit Ram *v.* Cluda Singh, 1886 P. R. 47.

² Balaji Tamaji *v.* Tamangoanda, 6 B. H. C. R. A. C. 9.

³ Chhotabhai Jethabhai & Co. *v.* The Union of India A. I. R. 1971 Cal. 221.

⁴ Chindamabaro *v.* Sri Niwas, 8 M. L. J. 6.

⁵ Parangodan *v.* Perumtoduka, 27 M. 380; Venkatarama *v.* Vemkata, 24 M. 27.

⁶ Ma Pwa Shin *v.* U. Po. Sin, 1937 (Rang.) 324, 170 I. C. 946.

⁷ Nageshwar Tewari *v.* Dwarka Prasad, 1953 All. 541.

⁸ 17 C. W. N. 521.

within a month. Claims of both arise out of the same cause of action and only one suit should be brought.¹ Where a contract of sale of goods was broken by the defendant, in part by refusal to take delivery, and in part by refusing to pay the price of goods delivered, it was held that there was only one cause of action for both.² Claim for interest on the date the principal has also become due, claim for principal³. Claim for possession, claim for mesne profits from the date of suit until delivery of possession.⁴ Claim for mesne profits and subsequent suit for possession.⁵ Suit for maintenance, suit for the same by enforcement of a charge on property even though the court deciding the first suit could not give relief claimed in the second suit.⁶ Where a sale deed was executed by the defendant in favour of the plaintiff and the consideration was made up of two old mortgage deeds and some cash, and the plaintiff on cancellation of the sale-deed, brought a suit for refund of the cash only, his subsequent suit on the basis of one of the mortgage deeds was held barred by O. 2, R. 2, C. P. C.⁸ One transaction of mortgage and lease, suit for rent, subsequent suit for mortgage is barred.⁹ Rent or mesne profits for several years due but suit only for some years, subsequent suit for other years barred.¹⁰ Suit for whole amount as heir of plain-

¹ *Appaswami v. Ramaswami*, 9 Mad. 279.

² *Ducan Brothers v. Jeet Mal*, 19 C. 372.

³ *Muhammad Hafiz v. Mirza Mohammad Zakarya*, 20 A. L. J. 17. 44 A. 121, 65 I. C. 79, 49 I. A. 9, 42 M. L. J. 248, 35 C. L. J. 126, 3 Pat. L. T., 1 P. W. R. 1922 (p. c.); *Chunnilal v. Amir Ahamad*, 1958 A. P. 608.

⁴ *Goswami Gordhanlal v. Bishambhar*, 25 A. L. J. 409, 1927 (All.) 716, 109 I. C. 736, 49 A. 597; *Mukunda v. Krupsindhu*, 1954 Orissa 202. For other cases as to past mesne profits see below under next paragraph.

⁵ *Soghir Hassan v. Tayyab Hasssan*, 1940 All. 524; *Makkhan Lal Modak v. Girish Ch. Jana*, 66 C. W. N. 692.

⁷ *Rama Rao v. Venkayamma*, 1931 Mad. 705, 134 I. C. 803, 1931 M. W. N. 893; *Jwala Pd. v. Padmavati* 167 I. C. 123, 1936 A. W. R. 1096, 1937 (All.) 56.

⁸ *Kamaruddinshah v. Sheikh Diljan*, 166 I. C. 996, 1937 (Cal.) 57.

⁹ *Md. Ahsanul Tuadid v. Akhtar Hassan*, 1960 Pat. 106 (contra : *Venkappa v. Gangadhar dharn*, 1959 JKer. 112.

¹⁰ *Narbadeshwari Pd. v. Saheb Singh*, 1951 All. 561, *Dwarikadas v. Vimal A. I. R.* 1964 Bom. 42. see also the illustration to OR II 2 C. P. C.

tiff's father decreed for half as other half held to be of mother, subsequent suit for other half on ground that mother had life interest only held barred.¹ Suit against order of dismissal from service. Subsequent suit for arrears of salary was not maintainable.²

The following are instances of claims having been held to arise from distinct causes of action : Claim on a promissory note, claim on the basis of original consideration after the promissory note was held to be unenforceable on account of material alterations,³ or the promissory note was not proved.⁴ Claim by a reversioner to challenge the validity of one alienation by a Hindu widow, similar suit in respect of another alienation.⁵ Suit for a specific sum of money as money had and received for plaintiff's use; suit for account and payment of sum found due.⁶ Suit for damages for failure to do repairs to a car; suit for its price on account of defendant's refusal to return.⁷ Suit for account upon a mortgage, suit for redemption.⁸ Suit for dissolution of partnership suit for account.⁹ Suits on two bonds, though they have been executed in lieu of of one original consideration,¹⁰ but in a case in which the defendant, in consideration of his liability for Rs. 1,300 passed a promissory note for Rs. 700 and agreed to do certain legal work for the balance of Rs. 600, but died before doing the legal work, the Allahabad High Court held that there was a single cause of action for money

(2) Of distinct causes of action

¹ Dip Chand v. Ramlal, 1961 Punj. 322.

² P. J. Saitins v. Supdt. Printing and Stationery 1965 A. L. J. 292, Angal v. State of Mahraashtra A. I. R. 1968 Bom. 304. Union of India v. P. V. Jagannath A. I. R. 1968 M. P. 204.

³ Saninath v. Palanaiapa, 25 I. C. 228, 18 C. W. N. 617.

⁴ M. K. M. V. Chetty v. Ma Mya, 94 I. C. 628, 1925 (Rang.) 304, 4 Bur. L. J. 130.

⁵ Bahadur Singh v. Sultan, 8 O L. J. 535, 66 I. C. 455, 3 U. P. L. R. (j. c.) 83.

⁶ Shib Singh v. Jograj, 1930 (All.) 116.

⁷ Harichand v. Cheragdin, 122 I. C. 733 (Lah.).

⁸ Laluchand v. Girjappa, 20 B. 469; Rajmohan v. Sardacharan, 1936 Cal. 200, 162 I. C. 709.

⁹ Jhandomal v. Ruliamal, 1937 (Lah.) 633, 169 I. C. 692.

¹⁰ Umed Dholchand v. Prisaheb, 7 B 134; Anantanarayan v. Savitri, 36 M. 151.

due on the promissory note as well as for recovery of Rs. 600 and separate suits could not be brought.¹ Suit for rent against a mortgagor who had, along with the usufructuary mortgage, also executed a lease agreeing to pay the rent, suit for the mortgage money.² Suit for money charged on property, suit to enforce the charge.³ Suit for possession ignoring a mortgage, subsequent suit for redemption of that mortgage.⁴ Suit for declaration and injunction (after dismissal under proviso to Section 42, Sp. Rel. Act), suit for declaration and possession.⁵ Suit for ejectment on ground of default in payment of rent, suit for arrears of rent.⁶ Suit for ejectment and subsequent suit for rent or damages.⁷ Suit for possession, suit for mesne profits.⁸ Suit for partition, suit for mesne profits.⁹ Suits for partition of different properties among tenants in common¹⁰. Suit for rent¹¹ or mesne profits for different years.¹² Suit by one co-sharer against the other in exclusive possession for share of profits, suit for partition, joint possession and

¹ *Preonath v. Bishnath*, 29 A. 256.

² *Ralia Ram v. Amin Chand*, 74 I. C. 122, 4 Lah. 52, 5 Lah. L. J. 259; *Bhagwan Das v. Jalaldin*, 69 I. C. 54 (Lah.).

³ *Bank of Bihar Ltd. v. Omitave Chattarji*, 186 I. C. 221 (pat.)

⁴ *Jaimal v. Ganeshi*, 4 Lah. 187, 5 Lah. L. J. 296, 75 I. C. 528; *Kalinath v. Manindra Nath*, 1940 (Cal.) 550.

⁵ *Mahomed Khan v. Shafi*, 120 I. C. 509, 1930 (Sindh) 87; *Bondey Ali v. Gokul Misir*, 34 A. 172.

⁶ *Khushi Ram v. Abdul Ghafur*, 63 I. C. 978.

⁷ *Lucknow Improvement Trust v. Md. Saddique*, 1952 All. 346.

⁸ *Manohar v. Gouri*, 9 C. 283; *Latessor v. Kanki*, 19 C. 615; *Pannamal v. Rama*, 38 M. 829, 28 M. L. J. 127, 17 M. L. T. 124, (1915) M. W. N. 130; *Gutta v. Maganti*, 31 M. 405; *Mayaing v. Maung Po.*, 4 R. 103, 95 I. C. 380; *Ram Chandra v. Lodha*, 1924 (Bom.) 368, 80 I. C. 259; *Contra, Naba Kumar v. Radha Shyam*, 134 I. C. 654, 1931 (P. C.) 229; *Chamnappa v. Bagal Kot Bank*, 1942 (Bom.) 338; *Mewa v. Banarsi*, 17 A. 533; *Ganeshi v. Mahesh*, 13 C. W. N. 669; *Rukmani Bai v. Vanakatesh*, 31 B. 517; *Ramib v. Thathiah*, 1938 M. W. N. 643, (1938) 1 M. L. J. 320, 174 I. C. 181 L. W. 547, A. I. R. 1937 (Mad.) 1849, 10 R. M. 669; *Saghir v. Tayab*, 1940 (All.) 524, 1940 A. L. J. 727, *Ranmgamma v. Purna Chandra Rao* (1965) 2 A. W. R. 226.

⁹ *Tikamdas v. Kishnomal*, 1939 (Sind.) 367.

¹⁰ 17 C. W. N. 521.

¹¹ *Naibadeshwari Pd. v. Sahib Singh*, 1951 All. 561.

¹² I. L. R. 1961 Bom. 234.

profits for subsequent year.¹ Suit for rent at old rate when proceedings for enhancement were pending, after decree in enhancement suit for additional rent (as enhanced) for the same years.² Suit by a co-sharer against *lamberdar* for account of one year, similar suit about subsequent year.³ Suit for declaration of title to property purchased by plaintiff and pre-empted by another person, suit for refund of consideration.⁴ Suit for refund of earnest money and suit for specific performance.⁵ Suit for declaration of title, suit for pre-emption.⁶ Suit by assignee for part of a deed assigned, suit for the remainder.⁷ Suit for possession on title by purchase, suit based on title by usufructuary mortgage.⁸ Suit for partition of joint property (not of joint Hindu Family) subsequent suit for other joint property not barred by O. 2 R. 2.⁹

A suit for interest against the mortgagor personally is no bar to a suit to recover principal and subsequent interest from the mortgaged property.¹⁰ In purchase of goods each purchase gives a distinct cause of action unless the items are so connected as to form continuous demand in which case the whole forms cause of action.¹¹

The Supreme Court has held that the plea of a bar under O. 2, R. 2 requires proof of the precise cause of action in the earlier suit and for this the plaint must be placed before the

¹ *Dunichand v. Jagdesh*, 1949 East Punjab 243.

² *Deb Narain v. Jagdish*, 110 I. C. 395, A. I. R. 1928 (Cal.) 684, 32 C. W. N. 870.

³ *Sheoshankar Dyal v. Sheo Shankar Sahai*, 1947 Nag. 176.

⁴ *Alum Khatun v. Hayat Khan*, 1938 (Lah.) 492, 40 P. L. R. 794.

⁵ *Sumer Chand v. Hukam Chand* A. I. R. 1965 M. P. 177.

⁶ *Ram Krishna v. Gur Dial*, 1941 (Lah.) 337.

⁷ *Sundar Singh v. Kuber Singh*, 1933 (Lah.) 1017.

⁸ *Goshawarali v. Adhiklal*, 1948 Pat. 302, 26 Pat. 26.

⁹ *Amar Nath Dauli Ram v. Ganesha Ram Alakh Ram*, A. I. R. 1971 Punj & H 241.

¹⁰ *Lalta Prasad v. Puranmal*, 51 A. 974; *Sultan v. Joti Sarup*, 1928 (Lah.) 269, 109 I. C. 613; *Nidhan Singh v. Rrem Singh*, 1940 (Lah.) 498.

¹¹ *Agustus Bros. v. M. A. Fernandex*, 31 I. C. 59, 29 M. L. J. 574, 2 L. W. 890, 18 M. L. J. 377, (1915) M. W. N. 765; *Kedar Nath v. Din bandhu* 47 C. 1043.

court. The cause of action cannot be inferentially presumed in this technical bar.¹

Several
causes of
action
treated as
one

Although an obligation and a collateral security for its performance furnish two causes of action it has been provided that they should be regarded as one cause of action for the purpose of O. 2, R. 2, C. P. C.² And, similarly, successive claims arising under the obligation, although furnishing so many different causes of action, are also deemed to constitute but one cause of action.³ Therefore if rent for 4 years is due, and a suit is brought only for 2 years, a separate suit for the remaining two years would be barred⁴ and if a suit is brought on an instalment bond for some of the instalments due up to date, a fresh suit for the remaining instalments would not lie.⁵

Joinder of
causes of
action

While a plaintiff is not compelled to include in his suit all the causes of action he may have against a defendant, he is certainly at liberty to unite, in one suit as many causes of action against a defendant as he likes.⁶ For instance, he may institute a single suit to recover money due on several bonds executed by the defendant at different times.

If there are several plaintiffs they can unite in one suit, against a defendant, as many causes of action as they like, provided that all the plaintiffs are *jointly interested* in all the causes of action. For instance, if X executes several bonds at different times in favour of A, B and C jointly, the latter three persons can sue X on all the bonds in a single suit. Similarly, a plaintiff can sue several defendants on several causes of action,⁷ provided all the defendants are *jointly interested* in all the causes of action.⁸ For instance., if A, B

¹ Gurbux Singh *v.* Bhoora Lal A. I. R. 1964 S. C. 1810 followed in Tibhu Ram *v.* Pyare Pasi A. I. R. 1967 Pat. 423 (P. B.)

² Narbadeshwar *v.* Sahib, 1951, All. 561.

³ O. 2, R. 2, Explanation.

⁴ Illustration to O. 2, R. 2.

⁵ 44 All. 663.

⁶ O. 2, R. 3.

⁷ O. 2, R. 3.

⁸ O. 2, R. 3.

and C execute several bonds in favour of X, the latter can sue them jointly on all the bonds in a single suit.

The reason of these rules is obvious. The object of permitting joinder of causes of action in a suit between two individuals is to avoid multiplicity of suits, and when the plaintiffs or defendants are more than one, but are jointly interested in the causes of action, they can safely be regarded as single individuals. But joint interest in the main questions raised by the litigation is a condition precedent of joinder of several causes of action in a suit by, or against several persons. Therefore, it is most important to find out whether there is, or there is not, a *joint interest* in the causes of action. The test is, whether there is community of interest in the case to be determined.¹ The mere similarity of the claims is no ground for joining in one suit several claims, which are several and distinct against several persons. For instance, if A and B execute one bond in favour of X, and B and C jointly execute another bond in favour of the same X, X cannot bring a single suit against A, B and C on the two bonds, claiming a certain amount against A and B and a certain amount against B and C. A suit for possession by redemption against one set of defendants and for possession, by ejectment against other defendants cannot be allowed.²

But in one case several causes of action can be joined in one suit by or against several persons even when they are not jointly interested in all the causes of action, that is, when the causes of action arise from the same act or transaction, and there is a common question of law or fact.³ For instance, if A and B are prosecuted by X for an offence and are acquitted, though the causes of action for suits for malicious prosecution by A and B are different, yet they can bring a joint suit, as the causes of action arise from a single act of X and as common questions of fact and law would arise.

¹ Bhagwati v. Bindeshari, 6 A. 106 (108).

² Anand Sarup v. Asad Ali, 14 A. L. J. 342, 28 I. C. 602.

³ O. 1, Rr. 1 and 3,

Excep-
tions

To these rules permitting joinder of causes of action there are the following two exceptions :—

(1) No other claim can unless with the leave of the court, be joined with a suit for the recovery of immovable property, except—

- (a) Claim for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) Claim for damages for breach of any contract under which the property or any part thereof is held;
- (c) Claim in which the relief sought is based on the same cause of action.¹

It must be noted that this exception relates only to suits “*for the recovery of*” immovable property, and not to suits merely relating to such property, such as suits for declaration of title,² or specific performance of a contract,³ or sale of immovable property in enforcement of a mortgage.⁴

The “leave” required by this rule should generally be obtained before filing a suit.⁵ It may be convenient to present an application for leave with the plaint. But there is nothing to prevent leave being given even after the institution of the suit.⁶

When a Muhammadan M, died leaving two heirs, A and B, and one C purchased immovable property inherited by A from M, and movables inherited by B from M, and both were in possession of one D, C was allowed to bring a joint suit against D for both the properties, as his cause of action was one, viz., dispossession and defendant’s refusal to deliver up the property.⁷ For the same reason, a claim for

¹ O. 2, R. 4.

² Gledhill v. Hunter, 14 Ch. D. 492.

³ Cutts v. Brown, 6 C. 328 (332).

⁴ Gora Chand v. Basanta, 12 I. C. 684, 15 C. L. J. 285.

⁵ Pilcher v. Hinds, 11 Ch. D. 905.

⁶ Llyod v. Great Western Dairies Co. Ltd., 23 Times L. R. 570.

⁷ Ganesh v. Mt. Jewach, 31 C. 262, 31 I. A. 10.

injunction, for appointment of a receiver or for a declaration of title may be added to a claim for possession, provided such claims do not amount to a new cause of action.¹

(2) No claim by or against an executor, administrator or heir *as such* shall be joined with claims by or against him *personally*, unless the last mentioned claim (a) is alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator, or heir, or (b) is such as he was entitled to or liable for, jointly with the deceased person whom he represents.²

In this rule the words "*as such*" are to be specially noted, for if an heir brings suit in respect of property inherited by him and which has thus become his own property, the suit cannot be said to have been brought by him as such heir, but it is a personal suit to which he can join any other personal cause of action. The suit to be one within this exception must be a representative suit. A Muhammadan widow's suit against other heirs for her dower debt and for her share in the inheritance of her husband is maintainable, as the latter claim is not as representing the estate of her husband but in her personal capacity and for her own benefit.³ Similarly, a Hindu widow's suit against the executors of her husband's estate for recovery of her *stridhan* and her share in her husband's estate is maintainable.⁴ So is a suit for *stridhan* and maintenance.⁵ In a Madras case, plaintiff's father carried on a business in partnership with the defendant, and after his death, plaintiff and defendant carried on business with the old partnership assets, the plaintiff then obtained letters of administration to his father's estate and sued for the accounts of partnership of the time of his father. He also joined a claim for his share in the partnership after the death of his father. The High Court held that

¹ Gledhill v. Hunter, 14 Ch. D. 492 (500).

² O. 2, R. 5.

³ Ahmad-ud-din v. Sikandar, 18 A. 256.

⁴ Hafizaboo v. Muhammad, 31 B. 105.

⁵ Janki Bai v. Sri Niwas, 38 B. 120, 20 I. C. 533, 15 Bur. L. R.

the claim was maintainable, as both the claims "arise with reference to the estate in respect of which he is suing as administrator."¹

Order of
separate
trials

Even when a joinder of causes of action is permissible under the above rules, the court has always power to order separate trials of the different causes of action or to make such other order as may be expedient, in case it thinks that all the causes of action so united cannot conveniently be tried or disposed of in one suit.² But the privilege of ordering the trial to be split up into two or more trials can be exercised by the court alone. The defendant cannot claim it as of right. If the court does not find it inconvenient to try the suit as brought, the plaintiff is certainly entitled to continue the suit in the form in which he has instituted it.³ But it has no power to dismiss a part of the suit and to try the rest or, except in very rare cases, to order the plaintiff to withdraw one part of the suit with liberty to bring a fresh suit. The power is discretionary, and, if the trial court does not think it necessary to exercise it, the Appellate Court will not interfere.⁴ This rule, it must be noted, applies only when the joinder of causes of action is only inconvenient or embarrassing but is otherwise legal and proper. It has no application to cases in which the joinder of causes of action is not permitted by law, and the judge has no power to try a suit which is bad for misjoinder of causes of action simply because he thinks he can conveniently try them in one suit.⁵ When the court passes an order under Order 2, Rule 6, the plaintiff should not be required to file separate complaints, but he should be given an opportunity to amend the complaint so that the allegations against each set of defendants in respect of the subject-matter of the cause of action against each

¹ *Arunachellam v. Arunachellam*, 43 M. L. J. 218, 16 L. W. 175, 69 I. C. 966, (1922) M. W. N. 453.

² O. 2, R. 6, C. P. C.

³ *Mohd. Ishaq v. Abdul Majid*, 1954 A. L. J. 34.

⁴ *Paira Ram v. Kesho Nath*, 73 I. C. 892, 1924 (Lah.) 156.

⁵ *Ram Pd. v. Sachi Dassi*, 6 C. W. N. 585.

are separately set out so as to enable the court to try the suit in sections.¹

A suit which offends against the rules relating to the joinder of causes of action is said to be bad for misjoinder, which may be of one of the following three kinds :—

(1) *Misjoinder of causes of action*, e. g., where a suit for damages for an alleged tort is joined with one for recovery of immovable property and the leave of the court is not obtained, or where a suit against a trustee relating to trust property is joined with a claim against the trustee in his personal capacity. Misjoinder of causes of action

(2) *Misjoinder of plaintiffs and causes of action* : This arises when there are several plaintiffs and they are not jointly interested in all the causes of action, nor do the causes of action in which they are severally interested arise from the same transaction, or, when they do arise from the same transaction, they present no common question of law or fact.² A suit by one of the two widows and an adopted son of a deceased, claiming to recover either the whole family estate for the latter, or in case adoption is not held valid, one-half of the estate for the former, is bad for misjoinder of plaintiffs and causes of action.³ It has been held that a widow and adopted son, if there is no dispute between them can bring a joint suit against the brother of the deceased to recover property which they claim as belonging to the deceased but which the brother alleges belongs to himself.⁴ A suit by a Hindu widow with her two daughters as co-plaintiffs against her step-son for maintenance and for marriage expenses of her daughters was held to be not bad for misjoinder.⁵ Where several plaintiffs each claiming title by adverse possession to different parcels of land filed (2) Of plaintiffs and causes of action

¹ Inder Bahadur v. Sitaram, 1941 (All.) 209, 195 I. C. 145.

² Chethru v. Md. Karim, 50 I. C. 328, 4 Pat. L. J. 297.

³ Lingam Mal v. Chinna, 6 M. 239.

⁴ Fakirapa v. Rudrapa, 16 B. 119; Ningawa v. Ramappa, 28 B. 94; Haramani v. Hari Churn, 22 C. 833.

⁵ Tulsa v. Gopal Rai, 6A, 632.

one suit for eviction, the suit was bad for misjoinder and plaintiff should be put to election.¹

But if the cause of action is one, the fact that the several plaintiffs derive their right to the property under separate titles will not affect the right to bring a joint suit. Thus several plaintiffs acquiring shares in the same property differently may bring one suit for possession of the property against persons dispossessing them.²

(3) Of defendants and causes of action

(3) *Misjoinder of defendants and causes of action* : This defect is technically called "multifariousness," and arises when neither all the defendants are jointly interested in the causes of action nor do the causes of action arise from the same transaction, or, when they do arise from the same transaction, they do not present any common question of law or fact. The following are a few instances of multifarious suits :—B agrees to sell land to A. A sues B for specific performance of the contract and joins C on the allegation that B was willing to execute the sale deed, but that C was in possession of the title deeds and was holding out a false claim of having an equitable lien, and that the plaintiff wants a declaration that C has no such lien.³ A suit by one of the partners claiming dissolution of partnership against the other partners and damages for breach of contract against another person, who is described as the plaintiff's agent in collusion with the partner.⁴ A suit by a plaintiff, to whom a member of a joint Hindu family had agreed to transfer his share for specific performance of the contract against him and for partitions of that share against the other members.⁵

Where, as a matter of fact, the plaintiff has but one cause of action against several defendants there can be no multifariousness and he can bring one suit, although the defendants might claim under different titles, or might have

¹ Hadu Sahu v. State of Orissa A. I. R. 1964 Orssa 159.

² Girja Nath v. Surendra, 16 I. C. 84, 16 C. L. J. 1.

³ Luckumsey v. Fazulla, 5 B. 177.

⁴ Muthappa v. Muthu, 27 M. 80.

⁵ Ramjayya v. Subramania, 40 M. 365 (F. B.)

different defences.¹ For instance, in a suit by a reversionary heir for a share in the estate, all the persons in possession of different portions of the estate under separate sale-deeds executed by the widow can be joined. Similarly, a member of joint family wishing to set aside various alienations made by his father in favour of different persons can bring a single suit against all.² Similarly, when A claims possession of land under a lease from B, and subsequently B lets the land in different parcels to C, D and E, who dispossess A, A can sue C, D and E in one suit, because they derive their title from a common trespasser B. But if the several persons in possession do not claim under the same trespasser, and have separately trespassed on different portions of the land, or have entered into possession under different title or titles derived from different persons they cannot be sued jointly.³

In the same way, when different defendants commit separate wrongs against the plaintiff, but as the result of a conspiracy between them, the conspiracy will be the plaintiff's cause of action and a joint suit will be maintainable.⁴ A suit for the recovery of a sum of money on two *ruqqas* on an allegation that all the defendants were benefited by the loan, though one *ruqqa* was executed by two of the defendants and the other by one only is not bad for multifariousness.

Where A, alleging that his brother B mortgaged his (A's) share to C and that C is in possession, sues B and C for a declaration of his title and for possession, the suit is not bad.⁵ A sells three properties to B. After the sale, they are attached in execution of a decree against A and

¹ Purshottam v. Bhagwanrao, 1938 N. L. J. 210, 1938 (Nag.) 46, 178 I. C. 215, 11 R. N. 211.

² Inder Bahadur v. Sita Ram, 1941, (All.) 209, 195 I. C. 145.

³ W. Dhar v. Htoon May, 52 I. C. 927, 12 Bur L. J. 106; Afzal Shah v. Lachmi Narain, 40 A. 7 (11), Dwa Hla Gyi v. Maung Po Thaung, 1938 Ran. 397, 1938 (Rang.) 420.

⁴ Varajlal v. Ramdas, 26 B. 259; Reddi v. Madava, 20 M. 260; Lockenath v. Keshab, 13 C. 147.

⁵ Inder Kr. v. Gur Pd., 11 A. 33; Mazhar v. Sajjad, 24 A. 358; Kubra v. Ram Bali, 30 A. 560.

purchased by D, E and F respectively. A suit against A, the decree-holder, and the purchasers to set aside the execution sales is not bad.¹

In a suit by an assignee of a mortgage, the plaintiff also added the assignor praying in the alternative for a decree against the assignor. It was held that in the interest of saving unnecessary litigation the suit should not be objected to and the court applied Section 99 in appeal when an objection of multifariousness was pressed.²

Where one of the two defendants is joined merely *pro forma*, and the real causes of action are against the other only, there is no defect of multifariousness. For instance, a single suit for pre-emption under several sale-deeds, all in favour of one defendant, can be brought, through the vendors, who are several are added as *pro forma* defendants.³

Procedure
in case of
misjoinder

All objections by defendant on the ground of any of the different kinds of misjoinder of causes of action must be taken by him at the earliest opportunity, and, in cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen (as by a subsequent amendment of the plaint by the plaintiff).

When such an objection is taken or when the defect is otherwise brought to the notice of the court, the court may order or permit the plaintiff to amend the plaint by withdrawing a portion of the claim with liberty to bring it again, and if the plaintiff fails to amend the plaint, the suit may be dismissed, but it should not be dismissed without giving the plaintiff an opportunity to amend the plaint. nor has the court power to dismiss one portion of the suit and to try the other, in order to remove the defect of misjoinder.⁴

¹ Harnand *v.* Prosuno Chandra, 19 C. 703; Gumani *v.* Ram Charan, 1 A. 555.

² Chandra Kant *v.* Basmatia, 22 Pat. L. T. 196.

³ Pairaram *v.* Kesho Nath, 73 I. C. 892, 1924 (Lah. 156.)

⁴ Singa *v.* Madava, 20 M. 360.

If a defendant does not, however, raise a plea of misjoinder, at, or before, the settlement of issues, the plea shall be deemed to have been waived,¹ and cannot be taken at a later stage, certainly not in appeal.² If the plea is raised and decided by the trial court, the decision will not be interfered with in appeal, even if it is erroneous, if it does not affect the merits of the case or the jurisdiction of the court.³

¹ O. 2, R. 7.

² Damodar Pd. *v.* Rimal 1966 A. W. R. (H. C.) 195.

³ See 99, C. P. C. Mohamed Husain *v.* Kishva Nandan, 1937 (P. C.) 233, 169 I. C. 1, 41, C. W. N. 1029, 1937 A. W. R. 631; Ram Dhan *v.* Lachminarain, 166 I. C. 649, 1937 (P. C.) 42, 1937 A. W. R. 184, 41 C. W. N. 418.

CHAPTER XII

Parties to Suit

The next question which has to be considered before drafting a plaint is as to who can join in a suit as plaintiff, and who can, and should, be impleaded as defendant, for though a suit cannot necessarily fail on account of any error in this respect, the plaintiff may have to amend his plaint, paying heavy costs to the other party, or if he has failed to implead the right person as a defendant he might find it impossible to implead him later as limitation may have run out by the time the omission is detected.

General

Order I C. P. C. carries the heading 'parties to suits'. Rule 1 relates to the joinder of plffs while R3 is in respect of the joinder of defts. In case of plffs a right to relief, must be alleged to exist in their favour whether jointly, severally or in the alternative. It must further be shown that such a right arises out of the same act, or transaction or series of acts and transactions i.e. the same cause of action. For joinder of defts the relief should be claimable against all of them jointly, severally or in the alternative and it should be the outcome of the same cause of action. It is also necessary that the matter is so connected as to give rise to a common question of fact and law. Out of the above proposition of law crops up the question of misjoinder and nonjoinder of Plffs on the one hand and the Defts on the other, in relation to the cause of action, See O VIII R 9 C. P. C.

The said rule lays down the principle of Equity that a defect of misjoinder or nonjoinder should not defeat a suit, but this provision of procedural law cannot override any requirement of substantive law, that the suit should be instituted against a particular person. For that reason the parties have to be classified into :—

1. Necessary ; party and

2. Proper party

A necessary party means (as the very word necessary implies) a party whose impleadment in the suit is absolutely necessary for determining the controversy between the parties and in whose absence no decree can be passed. A proper party on the other hand connotes a party whose presence in the suit helps the court in passing an effective decree and in completely deciding the rights and liabilities of the parties. The test in every case is whether there is any provision in law or rules for array of parties, and whether the provision is mandatory or simply directory. If it is the former nonjoinder is fatal.

The Supreme Court has observed in the case of *Jagannath* that in every case of nonjoinder, the court has to determine whether any provision of law or rule of procedure is merely directory or it is mandatory. Where it is directory, the nonjoinder of any party in violation of that provision or rule is not a fatal defect, and a decree can be passed against the parties on record, but if the party omitted is necessary, no relief can be granted.¹ In *Maqsood Ali's* case a similar view was expressed by Allahabad High Court.² In another case the Supreme Court expressed the view that the correct approach for the court is to see whether in the absence of a particular party it can or cannot proceed to determine the rights of the parties. If it cannot it should refuse to give any relief.³ The Madras and M. P. High Courts have also laid down similar tests for determining who is a 'Necessary' and who is a 'proper' party.⁴

The question as to who may join as plaintiff should first be considered. Whenever a suit relates to a joint

Joinder of
plaintiffs

¹ *Jagannath v. Jaswant Singh* A. I. R. 1954 S. C. 210.

² *Maqsood Ali v. Zahid Ali* A. I. R. 1954 All 385

³ *State of Punjab v. Nathu Ram* 1962 S. C. 89.

⁴ *Mahadev Rice Mills v. Chennimalai* A. I. R. 168 (Mad.) 287 *Sardar Nagendra Singh v. Jaidev* 1968 M. P. L. J. 176 *Hardev v. Ismail* A. I. R. 1970 (Raj.) 167.

right, all the co-sharers not only may join but as far as possible must join as plaintiffs,¹ and if any co-sharer in the joint right does not join as a plaintiff, or there are other substantial grounds for allowing one co-sharer to sue, the latter may be allowed to sue, joining the other co-sharers as defendants.² It is not, however, necessary to prove that such person had refused to join as a plaintiff.³ For instance all the partners must be joined in any suit concerning partnership business,⁴ all the co-sharers must join in a suit for the ejectment of a tenant,⁵ or for enhancement of his rent,⁶ or for arrears of rent.⁷ In all such cases when some of the partners are added as defendants the court should grant the appropriate relief and decree may be passed in favour of the plaintiffs and such defendants.⁸ After the death of one partner the surviving partners may sue to recover debts without joining the heir of the deceased partner.⁹ Even if one co-sharer has to sue for rent, making the others defendants, he must sue for the whole rent and not for his share only.¹⁰ But this rule is applicable to suits arising out of contracts only. It is not necessary that all the co-sharers should join in a suit against a trespasser,¹¹ but any one co-

¹ *S. A. Siluvai Muttin v. Mr. D. Sahul*, 98 I. C. 549, 51 M. L. J. 648.

² *Deoshi v. Bhikham Chand*, 100 I. C. 993, 29 Bom. L. R. 147; *Munshi Sahu v. Bhup*, 163 I. C. 405, 1936 (Pat.) 27.

³ *Tarini Kant v. Nand Kishore*, 12 C. L. R. 588; *Pyari v. Kedarnath*, 26 C. 409 (F. B.), 3 C. W. N. 371; *Biri Singh v. Nawal*, 24 A. 226; *Peria v. Velayutham*, 29 M. 302; *Balkrishna v. Moro*, 21 B. 154; *Ramchand v. Shadi*, 133 I. C. 871, 1931 (Lah.) 445.

⁴ *Rajchander v. Ramgati*, 31 C. 487.

⁵ *Gholam Mohiuddin v. Khairan*, 31 C. 786.

⁶ *Baidyanath v. Illim*, 25 C. 917; *Bhola v. Belchambers*, 10 C.I. 891, 14 C. L. J. 373.

⁷ *Pramada v. Ramani*, 35 C. 331; *Shsahi v. Sitanath*, 35 C. 744, 7 C. L. J. 425, 12 C. W. N. 835.

⁸ *Monghibai v. Cooverji*, 1939 (P. C.) 170, 182 I. C. I.

⁹ *Maung Shwe v. Ma Lonma*, 7 R. 558, 1929 (Rang.) 310.

¹⁰ *Radhabindu v. Naba Kishore*, 94 I. C. 244, 30 C. W. N. 415, 1929 (Cal.) 568; *Gopaldas v. Lokamal*, 182 I. C. 718, 1939 (Sind) 173.

¹¹ *Mannu v. Nasratullah Khan*, 21 A. W. N. 36; *Gangaram v. Relu*, 1933 Lah. 999; *Ambika v. Rameshar*, 1946 (Oudh) 221; *Motilal v. Basant Lal*, 1956 All. 175; *Sundarammal v. Sadashiv Reddiar*, 1959 Mad. 349. *Ram Narain Das v. Loknath Mandal* A. I. R. 1970 Pat. 1. (F. B.) overruling A. I. R. 1951 Pat. 315.

sharer can sue a trespasser. The reason is, that every co-sharer is independently interested in saving the property from the invasion of a trespasser, and the cause of action in such cases does not accrue to all jointly. A tenant holding over after the expiry of his lease is a tenant on sufferance and his position is akin to that of a trespasser. He can therefore be sued by one of the co-sharers alone.¹ It has however been held that a suit by a member of a joint Hindu family to recover joint family property must be instituted by or on behalf of all the members of the family.

Where, however, the suit does not relate to a joint right, every person who has a cause of action for the suit can bring a separate suit. But in certain cases several persons can, if they choose, join in one suit, even though their causes of action may be separate and distinct. They can do so when—*(i)* the right to relief alleged to exist in them, (whether jointly, severally or in the alternative), arises out of the same act or transaction, or series of acts or transactions, and *(ii)* the case is of such a character that if such persons brought separate suits, any common question of law or fact would arise.² Both these conditions must be satisfied before any two or more persons can join in one suit. For instance, several persons jointly prosecuted by the defendant may bring a joint suit for malicious prosecution. Where plaintiffs 1 and 2 claimed the entire money and plaintiffs 3 and 4 claimed a portion in a certain contingency, a joint suit against the person who was withholding that money unlawfully was permitted as the causes of action arose from the same act (*viz.*, unlawful detention of money by the defendant), and there was a common question of fact involved.⁴

The same rule is applicable to joinder of defendants. Joinder of defendants

Several persons against whom a right to relief is alleged

¹ Maganlal *v.* Budhar, 101 I. C. 35, 51 B. 149, 29 Bom. L. R. 230.

² Allam Ganga Dhar *v.* Gollapelli A. I. R. 1968 A. P. 291.

³ O. I, R. I.

⁴ Velappa *v.* Chidambaram, 43 M. L. J. 277, 70 I. C. 684, 1922 M. W. N. 316, 1922 (Mad.) 174.

to exist (whether jointly, severally or in the alternative), can, if a plaintiff so chooses, be joined in one suit, even though the causes of action against them are different, provided they have arisen from the same act or transaction, or series of acts or transactions, and, the case is of such a nature that, if separate suits were brought against such persons, any common question of law or fact would arise.¹ Both the conditions must be satisfied. If the causes of action do not arise from the same transaction defendants cannot be joined even though a common question may arise.² Such common question may, however, be only one out of a number of questions at issue.³ For instance, a suit to set aside an auction sale of plaintiff's property purchased in different lots by A, B, and C may be brought jointly against all the three purchasers.⁴ In a suit for arrears of rent against his tenant, a plaintiff can join the other co-sharers and pray for a money decree against them, if they have relinquished the right to entire rent from the tenants.⁵ A reversioner can jointly sue all the alienees of a widow for recovery of the property transferred by her separately to them.⁶

A purchaser of property dispossessed by third person who asserts title in himself may bring a joint suit against that person for possession and against the seller for refund of purchase money in the alternative.⁷ Similarly, in a suit against a debtor for money lent by plaintiff's agent, the agent may be joined with an alternative prayer that, if it be found that he had not lent the money to the defendant as he had represented, a decree for the money may be passed against

¹ O. I., R. 3; *Kanhaiyalal v. Keshodas*, 1961 M. P. 46.

² *Ram Autar v. Brij Kishore*, 1933 (Pat.) 653.

³ *Sonu v. Bahinbai*, 40 B. 351, 33 I. C. 950.

⁴ *Dorasami v. Muthusami*, 27 M. 94.

⁵ *Binode Lal v. Peronath*, 40 I. C. 173 (Cal.).

⁶ *Balakrishna v. Hiralal*, 36 A. 406, 94, I. C. 95, 12 A. L. J. 509; *Jivan v. Garbahi*, 25 P. W. R. 1924, 59 I. C. 522; *Ralia Ram v. Mulk Raj*, 54 I. C. 512, 2 U. P. L. R. 1918; *Lal Chand v. Manohri*, 44 I. C. 549, 64 P. W. R. 1918.

⁷ *Serajulhaq v. Abdul Rahman*, 29 C. 257.

the agent.¹ In a suit by a landlord against his agent for rents realized by the latter the agent pleaded that he had not realized a part of the rent, plaintiff was allowed to implead the tenant with the alternative prayer for recovery of rent from him.²

In a suit against the legal representatives of a deceased debtor plaintiff must be diligent to find out and implead *all* the legal representatives, though if he omits any one by a *bona fide* mistake the estate will still be liable.³

If several persons join in making a contract, their liability may be joint, or several, or joint and several. If the liability is several, the several persons may be sued separately to the extent of the several liabilities of each, or they may all be sued jointly.⁴ But if the liability is joint, or is joint and several, as in the case of liability for rent of a holding held by several tenants,⁵ the suit shall be for the enforcement of the whole liability, but the plaintiff is entitled to join all such persons or only some of them.⁶ If, however, he sues some only and the decree is not satisfied by execution against them, he cannot, according to the Calcutta and Bombay rulings,⁷ bring another suit against the person left out, but the Allahabad, Patna and Madras Courts have taken a contrary view⁸ and have held that the English rule⁹ on which the Calcutta and Bombay views are based is not applicable

Suits on contract

¹ Heyappa v. Perinnan, 29 M. 50.

² Bhagoti v. Chandra, 1933 (All.) 117.

³ Mt. Karam v. Matwal, 1933 Lah. 380, 141 I. C. 580; Mt. Chandri v. Hiralal, 1933 Nag. 73.

⁴ O. 1, R. 6.

⁵ Inderjit Nath v. Maharaja Pratap Udi Nath, 182 I. C. 821, 1939 (Pat.) 230.

⁶ O. 1, R. 6, read with Sec. 43, Contract Act; Kailash Chandra v. Brajendra, 1925 (Cal.) 1056, 42 C. L. J. 232, 29 C. W. N. 1000.

⁷ Hemendra v. Rajendra, 3 C. 353; Dick v. Dhanji, 25 B. 378, 3 Bom. L. R. 234; National Petroleum Co. Ltd. v. Popatlal, 165 I. C. 338; 1936 (Bom.) 344.

⁸ Md. Askar v. Radhe Ram, 22 A. 307; Ramanjulu v. Aravamudu, 33 M. 317; Traders Co operative Bank v. Mullick, 1934 Pat. 702, 147 I. C.

⁹ King v. Hoare, 13 M. & W. 494; Kendall v. Hamilton, 41 L. .T 418.

to India. Where a plaintiff could sue *either* of two persons, e. g., a contracting agent and his undisclosed principal, and he sues only one, he cannot afterwards sue the other even if his decree is not satisfied.¹ Where a Muhammedan died leaving several heirs a suit for rent against some of them was held to be bad.² A suit brought by a co-sharer of a deceased Muslim against another co-sharer for possession of his share cannot be dismissed for non-joinder of one of the several co-sharers.³

Suits for
tort

When several persons jointly commit a tort, the party injured may bring a suit against all or any of them, as he likes,⁴ and may claim the whole relief from the person sued,⁵ but he is not entitled to bring a separate suit against those whom he has omitted to join.⁶ Release of one joint tort-feasor will, however, operate as discharge of all, but if one is exempted on his paying money in full discharge of his liability others are not discharged.⁷ In a suit for ejectment, against trespasser however, all persons in possession must be made defendants and there is no distinction in principle in this respect between the cases of trespasser and of tenants. Where the heirs of a deceased defendant in such a suit were not brought on record, it was held that the suit could not proceed unless it was shown that the heirs were not in possession.⁸ Similarly, where two of the trespassers were minors and no guardian having been appointed for them the suit against them was dismissed it was held by the Appellate Court that the suit could not be decreed against the remaining defendants.⁹

¹ Somasundaram *v.* Subramaniam, 99 I. C. 742, (1926) M. W. N. 832, O. W. N. 1, 1926 (P. C.) 136.

² Naras *v.* Hayder, 49 C. L. J. 83, I. C. 180, 1929 Cal. 28.

³ Zaibaishi *v.* Naziruddin, 152 I. C. 1008, 1934 A. L. J. 1006.

⁴ Meyappa *v.* Maung, 12 I. C. 866, 4 Bur. L. T. 145.

⁵ A. Subhayya *v.* Verayya, 42 L. W. 17, 1935 (Mad.) 750, 1953 M. W. N. 1043.

⁶ Brinsmead *v.* Harrison, L. R. 7 C. P. 547; Rahimbhoy *v.* Turner, 14 B. 416.

⁷ Basharat *v.* Hiralal, 138 I. C. 77, 1932 All. 401, 1932 A. L. J. 497.

⁸ Arunadoya *v.* Mahammad Ali, 106 I. C. 260, 46 C. L. J. 433.

⁹ Makshud *v.* Khedu, 33 C. W. N. 742, 1929, (Cal.) 669, 124 I. C. 75.

When a necessary party is omitted, the defect is called *non-joinder of plaintiffs or non-joinder of defendants*, as the case may be. When a person is joined who should not have been joined i. e., against the rules above laid down, the defect is called *misjoinder of plaintiffs or misjoinder of defendants*, as the case may be. Any objection on the ground of non-joinder or misjoinder must be taken at the earliest opportunity, and, in all cases where issues are settled, at or before such settlement, and any objection not so taken is deemed to be waived.¹ If a defendant is allowed to file an additional written statement he may take the objection then.² If, however, the objection arises for the first time after settlement of issues, e. g., when a defendant dies and the plaintiff has substituted only two out of his three heirs, it can be raised when it arises.

Misjoinder
and non-
joinder

The result of such defect is not, always, fatal, and a suit cannot be dismissed simply on the ground of misjoinder or non-joinder of parties unless there is anything to the contrary in any Substantive law or the rules. The court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it,³ unless it is not possible for the court to determine the suit, e. g., if in a suit for ejectment of several persons jointly in wrongful possession, one of the persons is not impleaded as a defendant or in an administration suit a personal representative of the deceased is omitted,⁴ or in a partnership account suit, a partner is omitted,⁵ or all trustees are not impleaded as required by O. 31, R. 2.⁶ But, in giving effect to Order 1,

Conse-
quence of
such de-
fect

¹ O. 1, R. 13; *Abdul Cader v. S. L. Ahamado*, 160 I. C. 711, 1936 (P. C.) 51 (P. C.).

² *Sri Raja v. Sri Raja*, 62 M. L. J. 154, 1932 M. W. N. 494, 1932 (Mad.) 583, 137 I. C. 274.

³ O. 1, R. 9, *Abdul Cader v. S. L. Ahamado*, 160 I. C. 711, 1936 (P. C.) 51 (P. C.).

⁴ *Tuman v. Che Son*, 63 M. L. J. 369, 136 I. C. 632, P. 1932 (P. C.) 317.

⁵ *Amir Chand v. Raoji*, 58 M. L. J. 613, 130 I. C. 453, 1930 (Mad.) 714.

⁶ *Ram Gulam v. Shyam Sarup*, 1933 A. L. J. 1917, 55 A. 687,

R. 9, the court is entitled to take notice of events happening after the filing of the suit, e. g., if a suit is brought by one of the two persons jointly interested and the other dies during the pendency of the suit the court should not dismiss the suit for non-joinder but should decree it.¹ It has been held in Madras that in a suit for ejectment (not being one between landlord and tenant) if defendant pleads that he is in possession on behalf of a third person, the latter is a necessary party and if he is not joined the suit should be dismissed.² This decision appears to be based on the principles that multiplicity of suits should be avoided and that an effective decision of the suit will not be possible without the person on whose behalf the defendant claims to be in possession being before the Court. If the defect is pointed out to the plaintiff from the very outset and he has ample opportunity of remedying it which he fails to avail of the suit must be dismissed.³

This rule applies even to mortgage suits as O. 34, R. 1, which lays down who are the necessary parties to a mortgage suit is made expressly subject to the other provisions of the Code.⁴ If the Court can decide the suit as between the parties before it, it cannot dismiss it, but if it is not possible to pass any decree between such parties the suit must be dismissed.⁵ If therefore a prior mortgagee sues without joining a subsequent mortgagee the whole suit cannot be dismissed but only so much as relates to property affected by the subsequent mortgage.⁶ Similarly. if a mortgagee

¹ *Sarnammal v. Thangavolu*, 1940 (Mad.) 412, 190 I. C. 657, (1940) M. L. J. 240.

² *Pasumarth v. Mukkamala*, 146 I. C. 72, 1933 M. W. N. 1209, 1933 Mad. 664, 65 M. L. J. 290.

³ *Naba Kumar v. Radha Shyam*, 54 C. L. J. 274, 134 I. C. 654, 1931 A. L. J. 797, 35 C. W. N. 677, 1931 (P. C.) 229, 61 M. L. J. 294; *Raghubar v. Firm of Piarelal*, 145 I. C. 178, 1933 (Lah.) 93; *Probodh Lal v. Nilaratan*, 1936 (Cal.) 193; *C. Pillai v. D. M. Devashyamo*, 1956 Tr. Co. 181 (F. B.)

⁴ *Lasadin v. Mahomedali*, 1940 (Oudh.) 235, 186 I. C. 540, 1940 O. W. N. 209.

⁵ *Narayan v. Surajbhan*, 1937 (Pat.) 414, 169 I. C. 897.

⁶ *Alam Singh v. Gokul Singh*, 35 A. 484, 21 I. C. 271.

impleads only some of the heirs of a deceased mortgagor sale can be ordered of the shares of the heirs impleaded.¹ or court can implead those omitted,² and if some of the heirs of a deceased mortgagee are omitted a decree can be passed for the shares of the persons suing.³ The Patna High Court has held that the decree can be passed in respect of the entire amount due and need not be for proportionate amount only.⁴ But in such cases the right of the mortgagor omitted would remain unaffected and can be enforced against the plaintiff even if he purchased the property in execution of his decree.⁵ In a case,⁶ where some heirs were omitted and were joined after limitation, the Oudh Chief Court decreed the entire suit holding that Section 22 of the Limitation Act, 1908, did not bar the suit as the suit was against property and no relief was sought against the defendants personally. The Allahabad High Court⁷ following Madras⁸ and Bombay,⁹ has held that where the court appoints one of the heirs of a deceased respondent as his legal representative, he must be deemed to represent the other heirs also and a decree passed against him will be binding on others also, even if the deceased is a Muslim. A decree for redemption can be given on the suit of one mortgagor though others are not impleaded, as one mortgagor can redeem the mortgage. In a mortgagees suits no decree can be passed if all the mortgagees are not on record.¹⁰ In a suit for declaration by the mortgagee that transferee from mortgagor's son was not owner of the

¹ *Kherodamorji v. Habib*, 29 C. W. N. 51, 82 I. C. 638 *Contra* *Gurucharan v. Ram Chandra*, 1942 (Oudh) 197, 1941 O. W. N. 1297; in which it was held that the whole suit should be dismissed.

² *Satyadeva v. Tribeni* Pd. 161 I. C. 579, 1936 (Pat.) 153.

³ *Mohan v. Hem Chandra*, 105 I. C. 287, 1931 (Cal.) 648.

⁴ *Mohammad v. Champamani*, 179 I. C. 549, 1939 (Pat.) 49.

⁵ *Jasraj v. Sugrabai*, 1940 (Sindh) 195.

⁶ *Gurcharan v. Ram Chandra*, 1941 O. W. N. 1279, 1942 (Oudh) 197.

⁷ *Seikh Mohammad v. Tej Narain*, 1942 (All.) 324.

⁸ *Kadir Mohideen v. Muthu Krishna*, 26 Mad. 230.

⁹ *Johrabi v. Bismillabi*, 1924 (Bom.) 420, 80 I. C. 758, See also, *Virchand v. Kondu*, 39 Bom. 729.

¹⁰ *Girdhar v. Motilal*, 1940 N. L. J. 151. *Ram Pd. v. Vijay Kumar* A. I. R. 1967 S. C. 278.

disputed property, the mortgagor's son was not impleaded. Suit against the transferee alone was held to be not properly framed.¹ There is a conflict of opinion on the point if a decree can be passed if some comortgagees are impleaded as defendants beyond limitation. The Allahabad High Court and some Calcutta cases take the view that this can be done.² The Bombay High Court and other Calcutta cases take the contrary view.³ Where however on failure of plaintiffs little claimed as mortgagees adopted son, the mortgagees heirs were impleaded one as plaintiff and two as defendants in appeal and a decree was passed the Supreme Court held that the new parties were added to press their own rights and Article 22 limitation Act was attracted to such a case of addition of plaintiff under O 1, Rule 10 C. P. C. Also that O. 1, Rule 10 C. P. C. allowed addition as plaintiff only and not some as plaintiffs and some as defendants.⁴

Amend-
ment

The proper course when, such defect is detected, is to apply for removal of the defect by adding any person omitted,⁵ by substituting the right person for the wrong person, or by striking off the name of any party improperly joined, and the court has a very wide power to order such amendment on such terms as may appear just at any stage of the proceedings,⁶ even after a preliminary decree for partition⁷ or sale of mortgaged property⁸ has been passed. Even after an *ex parte* decree has been passed a person who was a necessary party can be added and allowed to have the *ex*

¹ Jugraj Singh v. Jaswant Singh A. I. R. 1971 S. C. 761.

² Baldeo Prasad v. Bholanath, 52 All. 134, 121 I. C. 106, 1929 (All.) 941; Umesh v. Hemanga, 60 C. 87, 143 I. C. 315, 1933 Cal. 325.

³ Adireppa v. Rachappa, 1948 Bom. 211, 50 Bom. L. R. 30, 31, 34 C. L. R. 113; Govind v. Jamaluddin 60 C. 777, 145 I. C. 259, 1933 (Cal.) 64.

⁴ Ram Pd. v. Vijay Kumar A. I. R. 1967 S. C. 278.

⁵ Capt. Daniels v. G. D. F. Trust, 1959 All. 579.

⁶ O. 1, R. 10 (2).

⁷ Jotindra v. Bejoy, 32 C. 483; Not followed by Andhra Pradesh High Court in (1961) 2 Andh. W. R. 469; Lakshmi Chand v. Kuchubhai, 35 Bom. 393, 13 B. L. R. 517, 11 I. C. 559; Krishnaji v. Motilal, 122 I. C. 66, 1929 Bom. 337; Daw Aye v. U. Kwe, 154 I. C. 465, 1935 (Rang.) 23.

⁸ Kunja Behari v. Bessudhar, 7 Cuttack Law Times, 49 (1941).

parte decree set aside.¹ Even an Appellate Court can exercise this power. Where in a suit on a contract defendant proved that a third person was also a party to the contract along with the plaintiff, it was held that the suit should not have been dismissed but the court should have impleaded the third person *suo motu*.² When the original plaintiff was found entitled to maintain a suit, transposition of a defendant as plaintiff was allowed.³ But if the conduct of the plaintiff has not been fair and straightforward and has been extremely negligent, e. g., when he has persisted in two courts in not adding a party even when he was given an opportunity to do so, court may dismiss the suit.⁴ Where in a suit against a railway administration, the defendant was described as, "Agent E. I. Railway", and no specific objection was taken at the trial and the suit was defended on merits, the defect in the title was allowed to be amended in second appeal.⁵ Similarly, when the defendant was described as "firm S, through C. L. Manager" an amendment by the substitution of C. L. as sole proprietor and manager of the firm S was allowed,⁶ but when a firm was sued for a debt taken by one of the partners A, and another partner B contested the suit on the ground that A had no authority to take loans for the firm, the Sind Court rejected an application for amendment by substitution of the name of A only for that of the firm.⁷ A trial court has no power to strike off a party added by Appellate court before remanding a suit for re-trial.⁸ Where a suit had been filed against K and S, on

¹ Rameshwar v. Th. Jeban Narayan Singh, 166 I. C. 794, 1937 (Pat.) 49.

² Sheomurat v. Jhabbumal, 1930 A. L. J. 247, 122 I. C. 597.

³ Santaram v. Trust of India, 1945 (Bom.) 11.

⁴ Narayanan v. Chekunni, 170 I. C. 242, 1937 (Mad.) 520.

⁵ Gopi Ram v. Agent, E. I. Rly., 30 C. W. N. 209, 94 I. C. 762, 1926 (Cal.) 612.

⁶ Kishen Singh Sant Ram v. Salig Ram Bhagat Ram, 1938 (Lah.), but the Supreme Court in S. N. Dutt v. Union of India, 1961 S. C. 1449 held that where notice under S. 80 C. P. C. was issued in the name of a firm of which S. N. Dutt was the proprietor, the suit by S. N. Dutt in his personal name was not maintainable.

⁷ Ahmad Mcosa v. Lila Ram, 1942 (Sindh) 93.

⁸ Radha Ballabh v. Bhullo, 1930 (All.) 303.

discovery that S had died before filing the suit, his heirs were added.¹ The Allahabad High Court is however of the view that even if the sole defendant was dead before the suit was filed, the plaint can be amended by the substitution of his legal representatives as it is a case of a suit against a "wrong person" or a "person improperly joined" within the meaning of Or. 1, R. 10, C. P. C.²

Proper
party

The power can be exercised by the court even of its own motion, and this is done particularly when the presence of a person is considered necessary in order to enable the court effectually and completely to adjudicate upon, and settle all the questions involved in the suit. This expression 'Proper Party' must be given a wide interpretation and may include questions between the parties to a suit and a stranger with regard to the subject matter of the suit.³ In such cases the power can be exercised even in the face of the plaintiff's opposition.⁴ Such person is called a "*proper party*," as opposed to a "*necessary party*" which means a party necessary for constitution of a suit and whose non-joinder affects the merits of the case and jurisdiction of the court and without whom no effective decree can be passed.⁵ But a party should not be added if the addition would result in the introduction of unnecessarily complex questions foreign to the issues in the case. For instance, in a suit on mortgage bond brought by the mortgagee, the defendant pleaded that the latter's nephew had also an interest and should be impleaded, but the nephew's application to be made a plaintiff was rejected.⁶ Similarly, where a third person alleged

¹ Rangrup v. Kashinath, 1947 Nag. 73; C. Raju v. D. D. Italia, 1961 A. P. 239.

² Mohd. Shukullah v. Prahlada Das, 1963 A. L. J. 230.

³ G. M. V. Krishnamachari v. M. O. Dhanalakshmi A. I. R. 1968 Mad. 142.

⁴ Secretary of State V. Durugesu, 118 I. C. 780, 1929 (Mad.) 443; Meyappa v. Seethachi, 171 I. C. 145, 1937 (Mad.) 200.

⁵ Udit Narain v. Board of Revenue, 1963 S. C. 786; Devi Das v. Shushailappa, 1961 S. C. 1277; Kaluram v. Tulsiram, 93 I. C. 932, 4 Pat. 723, 1926 (Pat.) 207; Hari Ram v. Central Govt., 1941 Lah. 120.

⁶ Sahasaheb v. Sadashiva, 43 Bom. 575; Sital Prasad v. Asho Singh, 1922 (Pat.) 651.

that he had acquired an interest in the property in suit under a compromise between the parties and the parties denied the compromise,¹ he was not impleaded. But in a partition suit a person claiming that the plaintiff had entered in-to an agreement for sale of certain properties with him was made a defendant.² But, where defendant in a suit for account pleaded that he had settled with plaintiff's brother who was also a partner in plaintiff's firm, the plaintiff was allowed to implead the brother.³ Where in a suit on a pronote by an endorsee the endorser alleged that he had endorsed the pronote only for collection he was allowed to be made a defendant and not a co-plaintiff.⁴ The Supreme Court upheld the impleading of the co-wife and step son in a suit for declaration of status and recovery of *kbarch-i-pandan* by a wife against her husband when the husband admitted the claim but the co-wife and step son wanted to contest it.⁵ A triangular contest is not contemplated by Rule 10, and a person whose interest is opposed to that of the plaintiff as well as to the defendant cannot be added as a party.⁶ In a suit by a landlord against his tenant for ejectment where defendant pleaded that the land belonged to Government, it was held that it was not proper to implead Government.⁷ But the Government is a necessary party whenever vires of an Act or rules framed by Government are challenged,⁸ Similarly, if the object of an attaching creditor is not to be allowed to redeem the mortgage, but to challenge the mortgage itself and a compromise arrived at in the redemption suit between the parties to it, he would not be impleaded.⁹ But even a

¹ *Meyappa v. Seethachi*, 171 I. C. 145, 1937 (Mad.) 200.

² *Krishnamachari v. Dhana Lakshmi Ammal* A. I. R. 1968 Mad. 142.

³ *Har Prasad v. Shankar Lal*, 1933 (All.) 957.

⁴ *M. R. Nazareth v. Peroz Shaw*, 1934 (Sindh) 182.

⁵ *Razia Begam v. Anwar Begam*, 1958 S. C. 886.

⁶ *Chidambaram v. Subramaniam*, 105 I. C. 114, 53 M. L. J. 269, 1927 (Mad.) 834; *Devendra v. Batasibai*, 1934 (Nag.) 228, 148 I. C. 720.

⁷ *Subramanya v. Anantha*, 1932 (Mad.) 688, 139 I. C. 679.

⁸ *Workmen v. Manager Tranovancre Rayans Ltd* A. I. R. 1968 Ker. 35.

⁹ *Bruel v. Kesheoras*, 1926 (Nag.) 67.

person not exactly a proper party may be added to avoid multiplicity of suits, e. g., in an administration suit, an alleged heir,¹ but not a person outside the family though in possession of part of the property.² So in a suit for rent against a recorded tenant, the transferee of the holding was allowed to be made a defendant though this involved determination of the question of the transferability of the holding.³ In a suit for property purchased by the plaintiff, the seller was also added as a co-plaintiff, but he afterwards denied that the sale was genuine. The court ordered his transposition to the array of defendants for the purpose of finally deciding the context between him and the purchaser also.⁴ In a suit under O. 21 Rule 63 C. P. C. by the decree holder when the J. D. satisfied the decree he was transferred a plaintiff to continue the suit.⁵ The court cannot refuse a defendant to be made a plaintiff on the ground that it would increase the valuation of the suit and take it out of its jurisdiction.⁶ The Court has no power to join a person as a co-plaintiff who is a stranger and has no personal interest in any of the reliefs claimed by the plaintiff. For example, where it is necessary to adjudicate on a general question affecting a whole community, this cannot be done by merely joining a member of that community as a co-plaintiff.⁷ If the court considers it necessary for giving effect to the rights of parties, it can add even legal representatives of a party against whom the suit has abated.⁸

But the fact that a person might be affected by the result of a suit, e. g., a financier who is promised a share on the suc-

¹ Maung Tui v. Maung Po, 103 I. C. 22 (Rang.)

² Ah Kyan Sin v. Yeo Ah Gwan, 1937 (Rang.) 497; *contra* Suryanarain v. Anasyamina, 1963 A. P. 298.

³ Sarjit v. Bibi Bersatan, 103 I. C. 544, 1927 Pat. 242, 8 P. L. J. 305.

⁴ Vanjiappa v. Annamalai, 1940 (Mad.) 69.

⁵ Lakshmi Chetty v. Guru Swamy A. I. R. 1964 Mysore 157.

⁶ Raj Kishore v. Alam, 1926 Pat. 28, 90 I. C. 82.

⁷ Fakir Mohammed v. Agha Khan, 120 I. C. 571, 1930 (Sindh) 73.

⁸ Mohammadally v. Safiabai, 1940 (P. C.) 215.

cess of the suit, is no ground for impleading him as a co-plaintiff.¹

No person can be added as a plaintiff without his consent.² If he does not agree to be made a plaintiff, he should be added as a *pro forma* defendant. Nor can any one be added as a plaintiff without the consent of the existing plaintiff.³ The Court should consider whether a person is a necessary or a proper party before calling him to be impleaded and exposing him to the travails of litigation.⁴

The Nagpur Court has held that in a partition or partnership case if the plaintiff's conduct is contumacious and defiant and he does not proceed with the suit, the court can make a defendant a plaintiff and *vice versa* and then proceed.⁵

In addition to this, the court has also power to order the substitution of another person for a person appearing as a plaintiff, or to order the addition of another person also as plaintiff, provided it is satisfied that the suit was instituted through a *bona fide* mistake in a name of a wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, and that the amendment is necessary for the determination of the real matter in dispute.⁶ But these conditions are necessary and must be satisfied. When a person brings a suit alleging that he has the right to sue and it is found that he has not such a right, the court would not be justified in directing amendment to enable the proper party to sue.⁷ For instance, in a suit by a trustee against a co-trustee which is found to be time-barred, the plaintiff cannot add a beneficiary as a plaintiff in order to take advantage of Section 10, Limitation Act,

¹ Kailash *v.* Ranchani, 58 M. L. J. 240.

² Narayanswami *v.* Subharamulu, 68 M. L. J. 236, 1935 Mad. 102, 41 L. W. 126.

³ Pravat *v.* Amulya, 101 I. C. 527, 45 C. L. J. 146.

⁴ Pappa Ammel *v.* Pandiyan Bank Ltd., A. I. R. 1963 Mad. 480.

⁵ Bal Krishna *v.* Sadashiva, 97 I. C. 1022.

⁶ O. I. R. 10 (1).

⁷ Samanu *v.* Kadathur, 93 I. C. 305, 1926 (Mad.) 577.

1908.¹ But where the suit is not barred, a court has power to substitute a right person for a wrong person.² A sole proprietor suing in a firm's name can not have the plaint amended by substituting his own name.³ In cases of partnership business or joint family business, the Supreme Court allowed amendment on the ground of misdescription.^{3A}

In a recent Alld. case, when a suit was brought in the name of the firm, the plaint. was allowed to be amended and for the name of firm, the name of Manager of joint Hindu family was substituted on the ground of misdescription Sec. 522 (1) of Limitation Act was held not to apply.⁴ If a suit is filed by an assignee of a bond and the assignment turns out to be void, the assignor's name can be substituted as plaintiff.⁵ When a person who had wrongly filed a suit made an application divesting himself of any claim and prayed for the substitution of another person who had a cause of action admitting that he himself had none, it was held that the case fell under rule 10.⁶ When a suit is brought in the name of a dead person or against a dead person there is a difference of opinion whether the plaint is a nullity and cannot be amended or whether it can be amended. The Lahore, Sind, Madras, Nagpur and Andhra Pradesh High Courts are of the view that if the sole plaintiff or sole defendant were dead before the suit was filed, it is a nullity and cannot be amended.⁷ But the Allahabad High Court has held that it is a

¹ *Jamna Das v. Damodar*, 29 Bom. L. R. 418, 103 I. C. 225, 1927 (Bom.) 424.

² *Krishnaji v. Harimaraddi*, 6 Bom. L. R. 314, 58 B. 536, 1927 (Bom.) 385.

³ *S. N. Dutt v. Union of India* A. I. R. 1961 S. C. 1449.

^{3A} *A. Purushottam & Co. v. Mani Pal and Sons*, 1961 S. C. 325. But see A. I. R. 1969 S. C. p. 1267.

⁴ *Sri Ram Nath v. Sri Kedar* A. I. R. 1970 All. 406.

⁵ *Sitla Bux Singh v. Mahabir Pd.*, 1936 (Oudh) 257, 162 I. C. 229.

⁶ *Municipal Committee v. Imran Ali*, 1934 (Nag.) 159, 150 I. C. 895.

⁷ *Mt. Bondu v. Motichand*, 1923 Lah. 652; *Noor Bhoy v. Secy. of State*, 168 I. C. 784, 1937 (Sind.) 92; *C. Raju v. D. D. Italia*, 1961 A.P. 239; *Calicut Municipal Council v. Kunlupathrama*, 1933 (Mad.) 854, 1933 M. W. N. 644, 143 I. C. 596; *Hazarimal v. Shriram*, 1934 (Nag.), 55, 148 I. C. 241; *Mahtab v. Amulya*, 24 I. C. 112; *Ramrup v. Kashinath*, 1947 Nag. 73.

case of a wrong plaintiff or defendant only and the heirs can be substituted by amendment.¹ But if it is discovered that one of the two or more defendants had been dead before the suit was brought, it cannot be said that there is no validly instituted suit and his heirs can be substituted,² under Order 1, Rule 10, and not under Order 22, Rule 10. The latter provision has no application. But the suit shall be deemed to be instituted against the heirs on the date on which they are brought on the record.³ Similarly, when a suit was brought on behalf of two mortgagees, one of whom had died, the court substituted his heirs. Both the last cases were governed by Rule 10 (2) and not by Rule 10 (1) and therefore there was no question of even a *bona fide* mistake, which arises only when the special powers of Rule 10 (1) are invoked.⁴ If a suit is filed by a person as minor through a *bona fide* mistake, he can be allowed to continue the suit as major on discovery of the mistake even if limitation has expired.⁵ This power can be exercised even in second appeal.⁶ The court has no power to add as plaintiff a person whose interest is against the existing plaintiff, though he may be added as a defendant if his presence is considered necessary.⁷

Even in cases not strictly falling under the rules of the C. P. C. courts have inherent power to pass necessary orders for addition or substitution of parties,⁸ though ordinarily the court will not add a party particularly a deft without the

¹ Mohd. Shakullah *v.* Prahlad Das, 1963 A. L. J. 230.

² Firm Palamal *v.* Fauja Singh, 1926 (Lah.) 153, 89 I. C. 661; Grodhandas *v.* Rijhibai, 168 I. C. 860 1937 (Sind) 47; C. Raju *v.* D. D. Italia, 1961 A. P. 239.

³ Kanangara *v.* Palayat, 1955 Md. 644.

⁴ Makram Ali *v.* Abdul Hamid, 104 I. C. 623 (Cal.).

⁵ Inderpal *v.* Bhagwati, 1940 O. W. N. 100; Ghasi *v.* Mangi, 1932 (Lah.) 322, 132 I. C. 710; Narayan *v.* Dulal, 100 I. C. 469.

⁶ Radhaballabh *v.* Raghunath, 180 I. C. 833, 1939 (Pat.) 397; Nur Mohammad *v.* Jaimulabdin, 1940 (All.) 399, 190 I. C. 384.

⁷ Vanjiappa *v.* Annamalai, 1940 (Mad.) 69.

⁸ Jaimala Kr. *v.* Collector of Saharanpur, 1933 A. L. J. 1512.

concurrence of the plaintiff.¹ When a father to whose share a pronote executed in the name of the son was allotted on partition brought a suit impleading the son also as a defendant, it was held that the suit should not be allowed to fail for want of an endorsement by the son, but the son should be allowed to be made a co-plaintiff.² But when a person is left out not by mistake but by gross negligence, he cannot be allowed to be impleaded.³

Intervenor

Besides acting on the motion of a party to the suit or on its own motion, the court can act under this rule on the application of a third person who wishes to be impleaded as a party to the case. Such a person is called "intervenor." If the intervenor is a necessary party to the suit he must be joined, but if he is not a necessary party, the court has to exercise its discretion in making him a party and in doing so, is guided by the same considerations which arise when a plaintiff applies for addition of a new person as defendant and which have been discussed above. An intervenor can be impleaded even against the plaintiff's wish where there is one subject-matter out of which several disputes arise and the main evidence on the issues raised by the intervenor will be the same, but if in any case serious embarrassment or inconvenience is likely to be caused to the plaintiff by addition of a third party, the court may refuse to implead him. An intervenor will generally not be impleaded where he is not directly interested in the issue between the existing parties but is only indirectly affected or where he claims adversely to both the plaintiff and defendant. Since the enforcement of the constitution of India, whenever Constitutional point questioning the vires of any law made by the Parliament or other State Legislatures is raised and the provision is such as to affect the interest of other States, such states are called upon as intervenor to put forth their point of view.

¹ Virbhadrapa v. Shekabal, 1939 Bom. 188, 182 I. C. 539; Banarsi Das Durga Pd. v. Panna Lal Oswal I. L. R. 1968-2 (Punj.) 309.

² Virappa v. Mahadevappa, 1934 (Bom.) 356, 36 Bom. L. R. 807.

³ Ghulam v. Lachman, 148 I. C. 329, 1934 (Lah.) 36.

When a new plaintiff or a defendant is added, or substituted, the date of his addition or substitution is deemed to be the date of institution, as regards that person, for the purpose of limitation, so that if a defendant is added after the expiry of limitation the suit *against him* is barred.¹ It has been held that the date of addition means the date on which application is made for his addition and not that on which Court passes its order on it.² This rule would apply even if the order is passed by the court *suo motu*.³ But the whole suit cannot be dismissed on this ground, unless the party originally on the record is not entitled to sue except in conjunction with the newly added person, or the suit cannot be decreed against the person originally made a defendant without impleading the new person. For example, a suit on a contract in which there are several joint promisees cannot succeed unless brought by all the promisees and if any one is left out he cannot be impleaded by amendment,⁴ and if he is impleaded after the period of limitation, the suit should be dismissed.⁵ Similarly, the Madras High Court has held that a suit by some of the heirs of a deceased partner against the other partners for account should be dismissed if the other heirs are not joined within limitation,⁶ but the Allahabad High Court has taken a contrary view.⁷ A suit on a mortgage by the assignee of one mortgagee without joining other mortgagees within the period of limitation will also fail for the same reason.⁸ But no question of limitation would arise if, by the amendment, no really new person is brought on the record and only his

¹ Section 22, Limitation Act, 1908; S. 21 Lim. Act, 1963.

² Praful v. Rao Gajendra, 1945 (Nag.) 57.

³ Ram Kinkar v. Akhil, 30 C. 519, 11 C. W. N. 350; Maung Tun Thein v. Maung Sin, 170 I. C. 105, 1937 (Rang.) 124.

⁴ Tipan Prasad v. Secy. of State, 154 I. C. 103, 1935 (Pat.) 86.

⁵ Ram Dayal v. Jummenjoy, 14 C. 791.

⁶ Abdual Hawk v. Tumulari, 100 I. C. 616, 52 M. L. J. 318.

⁷ Jamna Kuer v. Kunj Behari, 1937 All. 502, 170 I. C. 743, 1937 A. W. R. 527.

⁸ Giris Chandra v. Ram Saran, 125 I. C. 109, 1929 (Cal.) 591; Bhagela v. Abdul Rahman, 36 I. C. 77, 1916 (Pat.) 411.

description is changed. The test in such cases is whether one person or legal entity is substituted for another or the person or legal entity remains the same and only his name or description is altered.¹

For example, if a person has sued without saying that he was suing as a Shebait, an amendment to show that he has sued in that representative capacity has not the effect of adding a new plaintiff.² Similarly, where a joint family sues or is sued in its business name (as firm so and so) but afterwards the names of the members of the family are substituted either on the defendant's objection or on discovery that Order 30 does not apply to a firm owned by a joint family (which is only one person in the eye of law), it is only a correction of a misdescription and no question of limitation arises.³ But where any member of a joint family sued in his individual capacity, he was not allowed after expiry of limitation to amend the plaint so as to show that he was suing as manager of the joint family.⁴ When G was made a defendant and there being several persons answering the description plaintiff served the right person he intended to sue and afterwards corrected the description, it was held that S. 22, Limitation Act, 1908, did not apply.⁵ Similarly, where a suit for declaration of invalidity of an assessment was brought against the Chairman instead of the Municipal Commissioners as required by S. 15, Bengal Municipal Act, but the main relief sought was against the Corporation and not against the Chairman, it was held that it was a case of misdescription and S. 22 will not apply to the amendment.⁶ It has been held in a Madras case that when a person filed a suit but after the limitation had expired he was allowed to amend the plaint so as to make it appear

¹ *Mangharam v. Haji*, 182 I. C. 881, 1939 (Sind.) 172.

² *Kuarmani v. Wasif*, 28 I. C. 818, 19 C. W. N. 1193.

³ *Ram Prasad Shivalal v. Sri Nivas*, 1925 (Bom.) 527.

⁴ *Ramchandra v. Kandaswami*, 1949 Mad. 416, 1948-2 M. L. J. 577, 1948 M. W. N. 580.

⁵ *Girdhari Lal v. Dharam Das*, 162 I. C. 280, 1936 (Lah.) 147.

⁶ *Municipal Commsrs. v. Gangamani*, 1940 (Cal.) 153.

that it was instituted on behalf of a Company, there was no case of adding a new plaintiff.¹ For the same reason in a suit instituted by a next friend of a minor, when it was discovered that he was major he was allowed to appear as major even after limitation.² But this could be done only if the plaintiff was under a *bona fide* mistake and not where he was found to be grossly careless,³ or to have instituted a suit deliberately as minor, as when he instituted the suit for setting aside a decree on the ground that he was minor.⁴ Similarly, where a party is already on the record, an amendment which merely alters the capacity in which he has been impleaded does not involve an addition of parties. Therefore an amendment of the plaint by which a suit is converted into a representative suit does not involve an addition of a fresh party.⁵ Where a suit was filed in the name of the firm by partners doing business outside India and by an amendment the names of the partners were sought to be substituted for the name of the firm, the Supreme Court of India held that the amendment should be allowed as the case being only one of misdescription of the plaintiff, it was governed by Section 153, C. P. C. and Or .1, R. 10, and Or 6, R. 17 had no application.⁶ Though substitution of another legal entity cannot be allowed correction of misdescription of party in cause title can be allowed even after limitation has expired.⁷ Where an unregistered and unincorporated club sued in its own name and later wanted to substitute the names of its members as plaintiffs, it was held that the amendment could not be allowed as it was not a case of

¹ Muthu Krishna v. Rajaram, 33 I. C. 357, 3 M. L. J. 5.

² Narayan v. Dulal, 100 I. C. 469; Inderpal v. Bhagwati, 1940 O. W. N. 1007.

³ Ghasi v. Manga, 1932 (Lah.) 322, 132 I. C. 710.

⁴ Sami Nandu v. Katha, 1940 (Mad.) 522, 1940 M. W. N. 500.

⁵ Seth Nardaramdas v. Zuleka Bibi, 1943 (Mad.) 531, 1943 M. W. N. 304.

⁶ Purushottam v. Mannilal & Sons, 1961 S. C. 325, overruling Vyankatesh Oil Mill Co. v. Velmahomed, 1928 (Bom.) 191, 109 I. C. 99, 30 Bom. L. R. 107.

⁷ Dr. Jagdish Chandra v. Raja Narain Lal, 1961 M. P. L. J. (Notes) 199.

misdescription.¹ Where receiver of a firm had sued in his own name and later wanted the title to be amended by making the firm suing through him the plaintiff, it was held to be a case of wrong description and amendment was allowed. The Supreme Court held in that case that no question of limitation would arise.² When, however, a suit was brought in the name of a firm and was found to be not maintainable under S. 69 of the Partnership Act as the firm had not been registered, it was held that as the law relating to registration had been in force only for a short time, amendment might be allowed by substituting the names of the partners for that of the firm,³ but the Madras High Court refused to allow an amendment after subsequent registration of the firm so as to treat the suit as instituted after date of the amendment.⁴ On the question as to the effect of the subsequent registration of the firm on the suit, the majority of the High Court seem to be of the view that the suit is bad and cannot be continued even after amendment.⁵ The Lahore High Court has taken a contrary view.⁶ But where a suit can be maintained without joining certain persons who are added as partners for the benefit of the defendant only, no question of limitation arises,⁷ e. g., where the manager of a joint family sued on a promissory note in his name and other members of the family were added as plaintiffs for the defendant's protection, after the period of limitation, the suit was decreed.⁸

¹ *Rajendra v. R. C. Turf Club*, 1964 Cal. 57.

² *Venkata Mallayya v. T. Ramaswami Co.*, 1964 S. C. 818.

³ *Suga Kuer v. Brij Raj Ram Niwas*, 168 I. C. 986, 1937 (Pat.) 526.

⁴ *Subramania v. East Asiatic Co. Ltd.* 165 I. C. 939 (2), 1936 (Mad.) 991.

⁵ *Ponnuchami v. Muthusami*, 1942 Mad. 252; *Govindmal v. Kunj Behari*, 1954 Bom. 364; *Firm Danmal v. Firm Babu Ram*, 1936 All. 3; *J. C. S. J. Mills v. M's K. L. Sons*, 1960 J. & K. 101 F. B., *Union of India v. M/s. Durga Dutt*, 1961 Assam, 2; *Dwijendra Nath v. Govind Chandra*, 1953 Cal. 497.

⁶ *Nazir Ahmad v. People's Bank*, 1942 Lah. 289.

⁷ *Pateshri Pratap v. Rudra Narain*, 32 A. 241, 6 I. C. 981 (P. C.).

⁸ *Kishen Prasad v. Har Narain*, 33 A. 272, 9 I. C. 739 (P. C.).

Similarly, the title of a suit was allowed to be altered from "The Agent, East Indian Railway" into "The East Indian Railway Administration through the Agent," even after the period of limitation, on the ground that the reading of the plaint showed that the suit was directed against the Railway Administration and not against the Agent.¹

When a defendant is made plaintiff or *vice versa* no question of limitation arises,² Where A sued making B a *pro forma* defendant, and the court finding B and not A entitled to a decree transferred B to the array of plaintiffs and gave him a decree even after limitation, it was held that this was right.³ In a similar case, however, the *pro forma* defendant was not allowed to be made a plaintiff on the ground that the defendant should not be deprived of the valuable right which accrued to him under the law of limitation.⁴ If, however, he had been allowed to be made a plaintiff, the case could not be dismissed on the ground of limitation.⁵ In a representative suit under O. 21, R. 63, other persons may be added as plaintiffs after publication of a notice under O. 1, R. 8 though limitation for suit has expired.⁶

It had been held in some cases that change of person as plaintiff under O. 1, R. 10 (1), C. P. C. can be made even after limitation, and Section 22 Limitation Act, 1908, does not apply to such cases,⁷ but this view is no longer good law after the Supreme Court decision in A.I.R. 1967 S. C. 278.

The date to be taken into consideration for reckoning limitation is the date of addition or substitution, which means the date of order, but it has been held in Madras and Sindh that it means the date of application.⁸

¹ Sec. 22 (2), Limitation Act, 1908 (S. 21, Lim. Act, 1963); Raj Kishore v. Alam, 90 I. C. 82, 1926 (Pat.) 28.

² Ambi v. Kelan, 1937 (Mad.) 843.

³ Moolchand v. Bhup Singh, 105 I. C. 473, 3 Luck. 241.

⁴ Ram Das v. Chhota, 104 I. C. 526 (Pat.).

⁵ Nanak Chand v. F. I. Rly., 1925 Lah. 441, 6 Lah. 193.

⁶ Ramkali v. Kali Prasad, 1947 Pat. 257.

⁷ Subodini v. Ganoda, 14 C. 400; Ravji v. Mahadeo, 22 B. 672.

⁸ South Indian I. Co. v. Mathey, 100 I. C. 680, 52 M. L. J. 199; Hassanand v. Nandiram 1930 (Sindh) 259.

Form of
Amend-
ment

When permission has been obtained for substitution or removal or addition of a party, the plaint must be amended accordingly. It will not be sufficient to amend the cause title, but all consequential amendments in the body of the plaint should also be made. For example, if a new defendant has been added, a paragraph should be added showing his liability. If a defendant has been struck out all references to him by name or number should be omitted and if the number of defendants in the cause title has been altered, the references in the body should also be amended. If a defendant is dead and his heirs are substituted, allegations should be made about the death of the defendant, the fact that the newly added persons are his heirs, and facts showing how they are liable for the plaintiffs claims.¹

Representative Suits

Suits in which parties represent others or themselves and also others are called "representative suits." Such Suits are allowed to be filed by one or more persons as a mere rule of convenience. More precisely they are exceptions to the general rule that all persons interested in the subject matter of the suit should be made parties to it, so that the dispute may be finally decided. The object is to avoid delay, harassment and unnecessary expenses to parties and to save public time. The condition however is that the number of interested persons should be numerous (unmanageably large) and they should have a common interest. In order to make a suit representative it is further necessary to obtain the permission of the court at the earliest opportunity. Examples of the such suits are by or against the manager of a joint Hindu family as representing the whole family, suits by two or more interested persons in respect of a public trust under S. 92, C. P. C., suit by members of the public in respect of a public nuisance under S. 91, C. P. C., suit under S. 14 of the Religious Endowments Act, suit under Order 1, Rule 8, C. P. C. Examples of the other kind of such suits are by executors, trustees, mutawallis or benamidars. Other representative suits will be dealt with at the appropriate

¹ *Kanailal v. Ram Nihash*, 56 C. L. J. 228.

places, but representative suits under Order 1, Rule 8, C. P. C. may be dealt with here.

Sometimes the number of persons interested in a suit is so large¹ that it becomes inconvenient for all to be joined in it as plaintiffs or defendants, e. g., in a suit for the recovery of the estate of the deceased by numerous legatees under a will² or in a suit by tax-payers to restrain a municipality from misapplying their funds,³ or in a suit by the disciples of a *Mutt*⁴ for declaring a Mahant's alienation as invalid. In all such cases one or two of the persons having such interest may sue or be sued, with the permission of the court on behalf, and for the benefit, of all persons so interested,⁵ and then any decree obtained in such suit shall be binding on all such persons.⁶ Even for a suit by *panchasi*, although authorized by *biraderi* this procedure has to be followed⁷ but it is essential that the interest of the persons suing should be the same as that of those on whose behalf they sue.⁸ It has been held that the word "same" should not be interpreted as identical and would cover similar though distinct interest.⁹ Where of the large body of persons claiming to be in occupation of property in suit, some as owners, some as tenants, some as mere trespassers any person belonging to one of such classes of persons cannot represent all.¹⁰ It is immaterial that the large number of persons are the public at large, i. e., an indeterminate body or known persons

¹ For meaning of 'numerous' See *Kailash Pat v. Goswami*, 1950 A. L. J. 258.

² *Geereeballa v. Chander Kant*, 11 C. 213.

³ *Vaman v. Municipality of Sholapur*, 22 B. 646.

⁴ *Chidambaranatha v. Nallasiva*, 41 M. 124.

⁵ O. 1, R. 8.

⁶ Sec. 11, Explanation IV; *Ahmad Adam v. M. E. Makhri*, 1964 S. C. 107.

⁷ *Ahmad Sayed v. Bashir Ahmad*, 1949 All. 215, 1948 O. W. N. 397.

⁸ *Jugal Kishore v. Khuda Bux*, 98 I. C. 533, 1927 (All.) 96; *Manavedan v. Veerayan*, 1939 (Mad.) 751; *T. C. Jog v. Sri Ram Sarup*, 1955 All. 31.

⁹ *Babu Singh v. Bilaso Kuer* 1967 I. L. R. 46 Pat. 977.

¹⁰ *Kuppuswami v. Commissioner Corpn. of Madras*, 1939 (Mad.) 428.

named in the record.¹ The court shall give notice of the institution of such a suit to all persons interested either by personal service or by public advertisement. It must be clearly understood that this notice is notice of the suit and not a notice of the application under O. 1, R. 8. If a proper notice is not issued the irregularity will vitiate the proceedings and cannot be condoned under Sec. 99, C. P. C.² Any such person, if he likes, may apply to be impleaded in the suit and to prosecute or defend it. When he is a defendant in his personal capacity and knows of the permission and files a written statement without saying in what capacity he appears, he should be taken to have defended the suit in representative capacity also.³ In case of the death of a plaintiff or a his withdrawal from the suit the direction of the court should be obtained whether the remaining plaintiffs are sufficient or additional persons should be brought in.⁴ The Allahabad High Court has, however, held that if some plaintiffs withdraw, others can continue the suit and that fresh proceedings under Or. 1, R. 8, C. P. C. are not necessary after any plaintiff dies.⁵ It is not necessary to implead the heirs of the deceased plaintiff.⁶ The Supreme Court has held that the persons filing suit under Order 1 Rule 8 need not be the same who served the notice U/S. 80 C. P. C. if otherwise the plaint complies with Sec. 80.⁷

Permis-
sion to sue

The permission for a representative suit should generally be taken before the institution of the suit, but there is

¹ *Fazal Rahim v. Hussaina*, 1939 (Lah.) 572.

² *Punjab Co-operative Bank v. Hari Singh*, 143 I. C. 742, 1933 (Lah.) 749.

³ *Ismail v. Niamat*, 101 I. C. 738.

⁴ *Venkatakrishna v. Srinivas*, 130 I. C. 761, 1931 (Mad.) 452, 61 M. L. J. 135; *Girdhari v. Ramkhala*, 39 P. L. R. 407, 1937 (Lah.) 601, 173 I. C. 679, 10 R. L. 165; *Mehtab v. Ahmad*, A. I. R. 1940 (Lah.) 272, 190 I. C. 112.

⁵ *Biram Prakash v. Narendra Das*, 1961 All. 266.

⁶ *Fazal Rahim v. Hussaina*, 1939 (Lah.) 572.

⁷ *The State of A. P. v. Gundugola Venkata Suryanarayan* A. I. R. 1965 S. C. 1812.

no irregularity even if it is granted afterwards¹ The practice is to present an application for such permission along with the plaint, and the plaint is not registered until the permission is given. The permission to sue should be express² but it has been held by the Calcutta and Lahore and Bombay High Court that it is sufficient if it can be gathered from the proceedings.³ It has been held by the Privy Council that in view of exception 6 to Section 11, C. P. C. when the litigation has been *bona fide* and the omission to comply with the conditions of O. 1, R. 8 has been inadvertent and no injury from the omission has been sustained by the plaintiff in the second suit, the decree in the previous suit may be binding, but the burden on the defendant to prove the above facts is very heavy and ordinarily strict compliance with the letter and spirit of the rule must be insisted on.⁴

In an application for such permission, the nature of the common interest involved in the case, the persons so interested, and any special claim of the plaintiff to represent them, must be stated.

A suit under this rule may be brought on behalf of a section of the Jain Community,⁵ or on behalf of the Hindu community,⁶ but cannot be brought on behalf of the general public.⁷ Where, however, there are two parties in a caste, one for, and the other against a suit, it is not permissible for any member of the former party to bring the suit

¹ Fernandez *v.* Rodrigues, 21 B. 787; Sri Niwas *v.* Reghav, 23 N. 28; Baldeo *v.* Bir Gir, 22 A. 269; Ahmad *v.* Abdul, 44 C. 258, 39 I. C. 173; Shridhar *v.* Rajabhan, 105 I. C. 113.

² Hira Lal *v.* Bhairon, 5 A. 602.

³ Dhunput *v.* Paresh, 21 C. 180; Ismail *v.* Niamat, 101 I. C. 738; Punjab Co-operative Bank *v.* Hari Singh, 1933 Lah. 749, 143 I. C. 742; Mukrem Das *v.* Chhogan Kisan, 1959 Bom. 491.

⁴ Kumaravenlu *v.* T. P. Ramaswami, 1933 A. L. J. 762, 57 C. L. J. 528, 37 C. W. N. 853, 1933 M. W. N. 758, 35 Bom. L. R. 665, 143 I. C. 665, 1933 (P. C.) 83, 65 M. L. J. 87.

⁵ Manmatho Nath *v.* Harish Chandra, 33 C. 905.

⁶ Dhunpat *v.* Paresh, 21 C. 180.

⁷ Adamson *v.* Arumujam, 9 M. 463.

on behalf of the whole caste.¹

The procedure is only an enabling one, prescribing how a suit by numerous persons should be brought and does not bar a person from suing in his own right although the act complained of has injured other persons also.² Similarly, if no permission is taken under O. 1, R. 8 for a suit for a declaration that the defendants or any member of a Sabha or Hindu community have no right to a certain property, a decree cannot be passed as in a representative suit but a decree can be given against the defendants,³ but if a suit has been decided as a representative suit without sanction and without any objection by the defendant the frame of the suit cannot be allowed to be objected to in appeal.⁴ The form of title in a representative suit and how the allegation of representative capacity should be made will be found stated hereunder.

PARTIES IN SPECIAL SUITS

Suits for property dedicated to Idols

As an idol is a juristic person capable of holding property, suits relating to property vested in it should be brought in the name of the idol, and not in that of the manager or Shebait.⁵ Of course the idol must be represented in the suit by some sentient being, e. g., the manager of its property. It is not necessary that such manager should be *de jure* manager. A *de facto* manager can also sue.⁶ In the case of Private Trust a person who has made large donations, in the maintenance of the temple, can bring a suit for possession of the temple and the properties of the diety against the Pujari or Manager on behalf of the diety, to protect the property from

¹ Harikisandas *v.* Chhaganmal, 40 B. 158; Ismail *v.* Niamat, 101 I. C. 738; T. C. Gog *v.* Sri Ram Sarup, 1955 All. 31.

² Jadu Singh *v.* Sant Singh, 101 I. C. 500; Kumarvelli *v.* Ramaswamy (Ibid note 4, page 202); Ramakali *v.* Munnalal, 184 I. C. 620, 1939 (All.) 586.

³ Gobardhan *v.* Shama, 7 Pat. 197, 108 I. C. 330.

⁴ Dilawar *v.* Subhan, 8 O. W. N. 722, 1931 Oudh 375.

⁵ Jodhe Rai *v.* Basdeo, 35 A. 735 (overruling Raghunath Ji *v.* Shah Lal Chand, 19 A. 330); Thakurani *v.* Sri Shiva Sundari, 1945 (Cal.) 376.

⁶ Gopal Datt *v.* Babu Ram, 162 I. C. 346, 1936 (All.) 653; Jawahar *v.* Radha Gopal, 1945 All. 169.

misuse and misappropriation.¹ But anyone and everyone cannot sue.² Shebaita do formally represent the deity and it is not necessary that it should be separately represented by a disinterested person unless the interest of the Shebait is adverse to its interest.³ Even a suit by some of the shebaita is held to be maintainable.⁴ The title of the suit would be like this : “AB, an idol installed in the temple at Meerut, through CD, the manager of the temple.” The Calcutta High Court is of opinion that such suits should be brought in the name of the manager,⁵ but in a subsequent case a division bench of that court took a more lenient view and held that it is immaterial whether the suit is brought by idol represented by the Shebait or by the Shebait or Shebait of the idol.⁶

Where, however, the Shebait declines to institute a suit and his interest is adverse to that of the idol, the idol should be added as a party represented by a disinterested guardian.⁷ Ordinarily in such cases and, in cases where idol is added as a defendant, a person interested in the worship or in the subject-matter of the suit, having no interest adverse to that of the idol, is appointed as a next friend of the idol.⁸ Allahabad High Court has held that a person appointed as *Sarbarakar* of a trust property is entitled to bring a suit in his own name for the benefit of the idol.⁹ This is only an alternative form which is also permissible (see the form

¹ Ram Chand v. Thakur Janki Ballabhji Maharaj, A. I. R. 1970 S. C. 532.

² Doongar See v. Mukhu, 1947 A. L. J. 14.

³ Shridhar v. Monudra, 1940 (Cal.) 285; Manmohan v. Debbendra Prasad, 1949 Cal. 1997; Vikram Das v. Daulat Ram, 1956 S. C. 382.

⁴ Guru Charan Jena v. Satya Narayan Jena, A. I. R. 1971 Or 15.

⁵ Maharaja Jagadindranath v. Rani Hemanta Kumari, 32 C. 129. 3 C. W. N. 809 (P. C.); Gorachand v. Makhan Lal, 11 C. W. N. 489; Joyannath v. Hari Mohan, 59 I. C. 469 (Cal.)

⁶ Gobinda v. Mohont, 62 C. L. J. 153.

⁷ Kalimata v. Nagendra, 44 C. L. J. 522; Sharat v. Dwarka Nath, 58 Cal. 619; Maruti v. Shrigopal, 54 Bom. L. R. 415, 418.

⁸ Kalimata v. Nagendra, 44 C. L. J. 522; Sheoramji v. Sri Ridhnath, 45 All. 319.

⁹ Radha Krishna v. Maharaj Kunwar, 164 I. C. 919, 1936 O. W. N. 728.

given in item No. 1 of Appendix A to C. P. C.). A *Shebait* or trustee is competent to defend a suit against an idol, and a decree obtained against him will be binding on the deity, even though the *shebait* had himself made the transfer which is sought to be challenged by the suit; but if in any suit the *Shebait* has got a definitely adverse interest to the deity, another person should be appointed to defend the suit.¹ It is really immaterial whether the title of the suit is "AB, a deity through CD its *Shebait*" or "CD, *Shebait* of the deity AB."²

If property is conveyed to a person in trust for a temple or idol it vests in that person and he is entitled to sue and to be sued in respect of such property.

SUITS BY, OR AGAINST, A MATH.

The property of the Math vests in its Mahant and suits in respect of it must be brought in the name of the Mahant.³ A decree against the Mahant is binding on his successors as they form a continuing representation of the property of the Math.⁴

SUITS BY, OR AGAINST, GOVERNMENT

Under Article 300 of the Constitution of India, and section 79, C. P. C. the Central Government may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued in the name of the State.

SUITS BY, OR AGAINST, FIRMS

Any two or more partners carrying on business in British India may sue or be sued in the name of their firm. This is only an enabling rule and does not prevent parties suing or being sued in their individual names as firm is not an independent or separate person but only a compendious name for denoting the partners.⁵ The rule does not apply

¹ Pashupati Nath *v.* Pradyumna Kumar, 63 (Cal.) 454.

² Deoki *v.* Raghvindra Singh, 183 I. C. 371, 1939 (Pat.) 430.

³ Ram Prakash *v.* Anand, 43 I. A. 73; Narsembaswami *v.* Venkatalangan, 50 Mad. 687; Thakurdwara *v.* Isher Das, 9 Lah. 588.

⁴ Gulabbhai *v.* Sahang Das, 52 Bom. 431.

⁵ Atma Ram *v.* Mian Vma Ali 1940 (Lah.) 256, 190 I. C. 78.

to foreign firms.¹ Even after the dissolution of the firm, the suit can be brought in the name of the firm provided the firm existed at the time of the accrual of the cause of action,² though not necessarily at the time of the suit.³ Even a suit for dissolution of partnership existing between the plaintiff on the one hand and a different partnership or firm on the other may be instituted against such firm without disclosing the names of individual partners of the defendant firm in the plaint.⁴ If a firm carries on business in a foreign country, the suit must be brought by, or against, all the partners. A suit by a firm owned by a joint Hindu family cannot be brought in the name of the firm under which the business is carried on; but must be brought by all the members or the managing member of the family in his capacity as such manager.⁵ It has, however, been held in Sindh that it can be brought in the name of the firm also.⁶ Patna,⁷ ⁸ Calcutta, and Orissa⁹ High Courts have held that a suit against a joint Hindu family firm lies and to such suits Or. 30, R. 1, applies. The Lahore and Sind High Courts have added an explanation to O. 30, R. 1, that the rule applies to a joint family trading partnership, and therefore, a joint family firm in the Punjab and Sind can sue or be sued in the firm's name.¹⁰

¹ *Joharmal v. Lakshmandas*, 36 Bom. L. R. 983, 1934 (Bom.) 467.

² O. 30, R. 1, *Davis & Sons v. Morris*, (1883) 10 Q. B. D. 463 *American Frnishing v. Udai Ram* A. I. R. 1968 Delhi 163.

³ *Firm of Baldeo Pd. v. Firm of Haji Ali*, 27 A. L. J. 73, 112 I. C. 715.

⁴ *Choithram v. Khemchand*, 113 I. C. 370, 1929 (Sindh) 7.

⁵ *Amolak Chand v. Babulal*, 1933 (Bom.) 304, 35 Bom. L. R. 569; *Lalchand v. M. C. Boid and Co*; 61 C. 975, 152 I. C. 991, 1934 (Cal.) 810, 38 C. W. N. 914; *Hardeo Ram v. Girdhar*, 153 I. C. 510, 1935 (All.) 280; *Misri Lal v. Chandan Mal*, 1937 A. M. L. J. 41; *Motilal v. Girdhari Lal*, 1942 (Cal.) 613.

⁶ *Detaram v. Vishimdas*, 105 I. C. 854 (Sind).

⁷ *Alekh Chandra v. Krishna Chandra*, 1941 Pat. 596.

⁸ *Jamunadhar v. Jamuna Rai*, 1944 Cal. 138.

⁹ *Hari Shankar v. General Merchants*, 1956 Orissa 186.

¹⁰ *Nand Gopal v. Mehngamal*, 1940 (Lah.) 425; *Madan Theatres v. Ram Kissan*, 1943 (Cal.) 172.

It is not necessary that all the partners should join in the suit, but any partner can sue in the firms' name, even though others refuse to join, and in that case it is not necessary to implead the latter. If the latter want an indemnity against costs the court can stay the suit till the indemnity is furnished by the suing partner.¹ It is not even necessary to disclose the names of partners of the plaintiff firm unless the defendant demands it, in which case the names have to be disclosed.² The title in such suits should be as follows :— "AB, a firm carrying on business in partnership at Calcutta."

It is not necessary to add, "through or by CD, a partner or manager" as is the practice at some places. On the other hand, it would be incorrect to say so,³ as it is meaningless, for, if the firm is the defendant it is not for the plaintiff to say through whom the firm shall defend the case. Under the law any partner can put in a defence on behalf of the firm.⁴ If the firm is the plaintiff, the plaint will certainly be required to be signed and verified by one of the partners, and the name of that partner will be disclosed in the signature, with the addition "a partner of the firm," but there is no necessity of disclosing it in the cause-title. From the opening words "any two or more persons" in Rule 1, an impression has been created at some places that at least two persons should be named in the plaint as partners of the firm. Needless to say that this is not necessary. If any partner is also sued in his individual capacity, he may be added as a separate defendant. If any partner dies before the institution of the suit, the suit can still be brought in the name of the firm and it is not necessary to implead his legal representative.⁵ But in that case, the private estate of

¹ Bhadreshwar Coal Co. v. Satish Chandra & Co., 165 I. C. 390, 1936 (Cal.) 353.

² O. 30, R. 2.

³ Ajit Singh v. Grunning & Co., 1925 (Bom.) 494; Phusia v. Mohd. Tassadduq Hussain, 1952 All. 685.

⁴ O. 30, R. 2.

⁵ O. 30, R. 4.

the deceased partner, as opposed to partnership assets, cannot be made liable even by a subsequent proceeding in execution under O. 21, R. 50 (2).¹ Therefore, if it is proposed to make such estate also liable, the plaintiff should implead the legal representative as a defendant. If a partner dies during pendency of a suit brought in the name of a firm the suit does not abate if legal representatives are not substituted.²

If a firm is made a defendant, the plaintiff will have to obtain the direction of the court as to how the summons should be served, for under O. 30, R. 2, the summons can be served on any partner or manager "*as the court may direct.*" The plaintiff should therefore make an application with the plaint proposing on whom he wishes to have the summons served and praying for the orders of the court. It is not sufficient merely to mention in the cause-title the name of the person on whom summons should be served as this is not a matter for plaintiff's choice; but if service has been effected on a person as a partner it would not be bad because the direction of the court has not first been obtained.³ Summons cannot be served on the legal representative of a deceased partner.⁴ If the firm has been dissolved, the summons should be served on all partners within India whom it is sought to make personally liable,⁵ and no partner not served will be made liable by any subsequent proceeding in execution. If it is not sought to make any partner personally liable and the plaintiff will be satisfied with a decree against the firm property, he need not serve the partners personally.⁶ If summons is intended to be served on a manager, a notice should also be served along with

¹ Mathuradas v. Ebrahim, 105 I. C. 305, 29 Bom. L. R. 1296, 51 B. 986.

² Prayag Mandar v. Mukteshwar, 1949 Pat. 63.

³ Keen v. Lily Biscuit Co., 138 I. C. 637, 1932 (Cal.) 541, 59 C. 496.

⁴ Mathuradas v. Ebrahim, 105 I. C. 305, 29 Bom. L. R. 1296, 51 B. 986.

⁵ O. 30, R. 3.

⁶ Topanmal v. Assudomal, 165 I. C. 907, 1936 (Sind) 206; Ebrahimjee v. Br. In. St. Nav. Co., 161 I. C. 324, 1936 (Sind.) 34.

it informing the manager in what capacity the summons is served upon him, otherwise the service upon him will not be effective service on the firm.¹

The defence on behalf of the firm may be made by any partner, but the partner must appear individually in his own name,² though the defence will be on behalf of the firm. Each of the partners who has entered appearance as such has precisely the same right as regards the conduct of the case as one of the several defendants having a common defence.³ The written statement should be headed as "Written Statement on behalf of firm AB and Co. by CD, one of the partners appearing in the suit." The defendant firm will be sufficiently represented even if one of the partners appears. If several partners file separate defences, they will be all on behalf of the firm and will be regarded as so many different defences of one defendant. A manager cannot file a defence on behalf of the firm unless he comes within the definition of a "recognised agent" given in O. 3, R. 2, i. e., unless (1) the partners live outside the jurisdiction of the court, and (2) they have not appointed any agent for defending their suits.

If a person is served as a partner, he may appear under protest denying that he is a partner, but in that case he cannot file a defence to the claim on merits.⁴ In such cases, the plaintiff may disregard his appearance and serve another partner or the manager, and, if no appearance is made, may obtain an *ex parte* decree against the firm,⁵ without having the question of the partnership of the person appearing under protest determined. If the plaintiff afterwards wants to execute the decree against such person, he can do so only

¹ O. 30, R. 5.

² O. 30, R. 6.

³ *Purshottamlal v. W. T. Henley*, 1933, A. L. J. 1264, 145 I. C. 812, 1933 (All.) 523.

⁴ *Gambhir Mal Pandiya v. J. K. Jute Mills*, 1963 S. C. 243; *International C. C. Co. v. Mehta Co.*, 105 I. C. 356, 31 C. W. N. 103, 1927 (Cal.) 780; *Nandlal v. Baker*, 1940 (Bom.) 390.

⁵ O. 30, R. 8.

under O. 21, R. 50 (2), Code of Civil Procedure.¹ It has, however been held in Bombay² and the same is the view of the Supreme Court also,³ that if the person appearing under protest insists, the court is bound to decide the question of his partnership in any case. It is not possible for a person who has not been served with a summons to enter appearance and defend the suit on merits unless he admits that he is a partner, but when such person is interested in some way or the other in the assets of the firm, he can apply to be made a party and it will be proper for the court to implead him even against the wishes of the plaintiffs.⁴

If a single individual carries on business in a name other than his own, he cannot sue in that name and must sue in his individual name,⁵ but under O. 30 R. 10, C. P. C. he may be sued in the name under which he carries on business. According to a Full Bench of Allahabad High Court a Company is an individual within the meaning of this provision even if carrying on business in some name other than its own.⁶ For instance, if A has a shop called the "Provincial Cycle Mart," he can be sued in the name of the "Provincial Cycle Mart," but if he himself has to bring a suit, he must do so in his personal name. But this rule applies only if business is carried on at the time of suit, and in India.⁷ If the proprietor is dead, the suit should be brought against his legal representatives and not against the trade name.⁸ If it is still brought against the trade name the suit will be a nullity according to some High Courts but not the Allahabad High Court.⁹

¹ P. S. Ramanujachary *v.* Phokoo Mal, 99 I. C. 495, 28 Bom. L. R. 1275, 50 B. 665, 1926 Bom. 585.

² Vithaldas *v.* Hansraj, 23 Bom. L. R. 1249.

³ Gambhir Mal Pandiya *v.* J. K. Jute Mills, 1963 S. C. 243; Also see A. I. R. 1964 S. C. 581.

⁴ Dhari *v.* Har Govindroy, 40 C. W. N. 677.

⁵ Scott *v.* Jitta & Co., 38 Bom. L. R. 529.

⁶ Rajendra Pd. Oil Mills *v.* Chunni Devi A. I. R. 1969 (All.) (F. B.).

⁷ Joharmal *v.* Lakshmandas, 36 Bom. L. R. 983, 34 B. 467.

⁸ Habib Bux *v.* Samuel Fitz & Co., 23 A. L. J. 861, 89 I. C. 22, 1926 (All.) 161; Firm Daulat Ram *v.* Ishar Das, 111 I. C. 706, 1929 (Lah.) 149.

⁹ See cases in Footnotes nos. 4 & 5 on p. 205.

When a suit is brought against a person in his trade name, his legal representatives should be brought on record if he dies during the pendency of the suit.¹ All the rules relating to service on a firm apply when the defendant is sued in such assumed name.

SUIT BY, OR AGAINST, A CORPORATION

Corpora-
tion

Corpora-
tion Sole

Corporations are of two kinds :—

(1) "Corporation Sole" is an incorporated series of successive persons.² It is a body politic having perpetual succession, constituted in a single person, e. g., the Administrator General and the official trustee who are constituted as corporation sole under the Administrator-General and the Official Trustees Acts respectively.

Corpora-
tion Aggre-
gate

(2) "Corporation Aggregate," is an incorporated group of existing persons.³ It is a collection of many individuals united into one body under a special denomination having perpetual succession under an artificial form and vested by the policy of the law into the capacity of acting in several respects as an individual. Registered Companies, Municipal Boards, District Boards, Co-operative Societies, Universities are examples of such corporations.

A suit by or against a corporation sole must be brought in its corporate name, e. g., "The Administrator-General for the U. P."

Suits by or against a registered Company or by other Corporation aggregate should be brought in the official style and name of the corporation,⁴ and not in the name of any of its officers, or through an agent, unless a corporation is, by the statute incorporating it, permitted to sue, or is required to be sued in some other name, in which case it should sue or be sued in that name. When suing on behalf of a corporate body or bringing a suit against it, the

¹ Hari Bandhu v. Hari Mokan, 34 C. W. N. 36.

² Salmond's Jurisprudence, 10th Edition, p. 327.

³ Ibid.

⁴ Ramdas v. Stephenson, 10 W. R. 366; Singer Manufacturing Co. v. Baijnath, 30 C. 105.

relevant Act under which it is incorporated should be referred to and the provisions of incorporation carefully looked into. The name of the officer signing or verifying a plaint need not be mentioned in the heading.¹ For instance, the title of a suit against a registered Company should be like this :— “A, B, a Company, Limited, having its registered office at Kanpur.” The proper name under which a suit can be brought against a Railway Company is the name and style under which it carries on business.² A decree against an officer, e. g., the agent, would not bind the company, but if the plaint shows that the description of the defendant is a mere error and that the real person sued was the company, the suit may proceed against the company.³ A suit against a Municipal Board should also be brought against the Board and not against the Secretary or the Chairman. The title would be “The Municipal Board of—.” In all such cases, the name of the officer upon whom service of summons should be made, should be mentioned after the name of the Company or corporation, by the addition of such words as “through the Secretary” or “through the Managing Director,” even though this is not a legal requirement, the court should get this information somehow. In Sindh it had been ruled that a separate stamped application should be filed stating the mode in which, and the person on whom, the plaintiff desires the summons to be served.⁴

Societies registered under the Societies Registration Act, 1860 may sue in the name of the President, Chairman, Principal, Secretaries or Trustees as may be determined by the rules of the society (see Sec. 6). The title of the suit should be somewhat as follows :—

Registered
Societies

“AB, President of the Arya Sabha U. P., a society registered under the Society Registration Act, 1860.” A repre-

¹ Narain Das *v.* Qureshi, 1933 (Sindh) 102, 142 I. C. 361.

² Campbell *v.* Jackson, 12 C. 142.

³ Radhelal *v.* R. I. Ry., 1926 (Pat.) 40, 90 I. C. 680, 5 Pat. 128.

⁴ Naraindas *v.* Qureshi, 142 I. C. 361, 1933 (Sindh) 102.

sentative suit may be brought by one member. A person having a claim against the society may sue any of the above persons, unless on an application to the governing body referred to in S. 16 some other officer or person is nominated to be the defendant (S. 6, Proviso). The Society can sue its individual members for any arrears of dues or penalty, or for any damage in respect of any unlawful detention of, or injury, or destruction to, any property of the Society (Ss. 9, 10). Another kind of Society which comes under the category of Registered Societies, is a Co-operative society. Such Societies owe their existence to the provisions of Indian Co-operative Societies Act 1912, as amended by the enactments of the various states. Under a general model they are registered with the Registrar of Co-operative Societies of that state. They are legal entities and can sue and be sued in their own names. Under the rules and bye-laws, generally the Chairman/Secretary is authorised to represent them. However, the disputes touching the affairs of such societies, whether between two societies or the society and its officers or servants and agents or whether between any two or more members are decided through arbitration machinery provided in the Act.

Unregis-
tered asso-
ciation

Suits by, or against, an unregistered Company, Society, or other Association such as a club or a library, cannot be brought in the name of the Company, Society or Association but must be brought by, or against, all the members of such institutions. If the number of such members is large advantage may be taken of the special procedure of Order 1, Rule 8, C. P. C.,² but that is only if there is a cause of action against all the members, e. g., when they entered into the contract or they authorised it.³ Generally, in case of clubs, members at the time of suit are different from those at the time of accrual of cause of action, as persons are daily

¹ Moti Ram v. Mangharam 1942 Sindh 130.

² Muhammadan Association v. Bakshi, 6 A. 284. followed in Corporation of Triwendum v. Narain Pallai 1968 Ker. T. 285, 1968 Ker. L. R. 180.

³ Scott v. The Firm, 88 I. C. 784 (Sind).

going out and coming in. In such cases, present members cannot be liable for debts incurred before they became members; and therefore the procedure under O. 1, R. 8, C. P. C. cannot be availed of.¹ The Madras High Court has held that this procedure is inapplicable to a money suit but can be applied in a suit for declaration or injunction.² The Bombay High Court has held that a representative suit can be brought but the plaintiff must not claim a money decree against the defendants but should claim a declaration that he is entitled to sum due to him which should be paid out of the funds of the Society.³

SUITS BY, OR AGAINST, TRUSTEES

In all suits concerning property vested in a trustee, executor, or administrator, where the contention is between the person beneficially interested and third persons the trustee, executor or administrator shall represent the persons beneficially interested⁴ and shall be described as follows :—

“AB, a trustee of the estate of CD, deceased,” or “AB, executor of C. D. deceased.”

If there are more trustees, executors or administrators than one, all shall be joined as parties, except those who are outside India.⁵ If any one refuses to join or has an adverse interest he should be impleaded as defendant.⁶ If any trustee is not joined the suit will fail, in spite of O. 1, R. 9, C. P. C.⁷ It can, however, be saved by impleading the remaining trustee or trustees by leave of Court.⁸ An executor who has not proved his testator's will need not be joined. The court may in a proper case add the beneficiary

¹ *Barker v. Allamassar*, (1937) 1 All E. R. 75, 78, 79.

² *Ratnaswami v. Prince of Arcots Endowment*, I. L. R. (1938) Mad. 1094.

³ *Harish Chandra v. A. S. Graig*, 1942 (Bom.) 136; *Ideal Films v. Richard*, (1927) 1 K. B. 374.

⁴ O. 31, R. 1.

⁵ O. 31, R. 2.

⁶ *Mohammad Soleman v. Tasadduq Hussain*, 1935 (Cal.) 623; *Nazir Ahmad v. Raghbat Ali*, 53 I. C. 478 (Cal.)

⁷ *Ram Ghulam v. Shyam Sarup*, 1933 A. L. J. 1393, 55 A. 687,

⁸ *Capt. Daniels v. G. D. F. Trust*, 1959 All. 579.

as a party, e. g., when the trustee, executor or administrators' interest is hostile to the beneficiary or he appears to be in collusion with the debtor of the estate.

MORTGAGE SUIT

In such suits all persons having an interest either in the mortgage security or the right of redemption shall be joined as parties.¹ It is not necessary that all should be arrayed on one side; it is sufficient that they are all before the court. For instance, one of the several mortgagees can sue if he impleads the others as defendants.² The primary parties to the mortgage, as well as those who have acquired the mortgagor's or mortgagees' rights by operation of law or by voluntary transfer must be impleaded. If a property vests in trustees, the latter alone are necessary parties and the beneficiary need not be added.³ A prior mortgagee is not a necessary party to the suit on a subsequent mortgage but a subsequent mortgagee must be impleaded in a suit on a prior mortgage. In a redemption suit all mortgagors and, if the suit is brought by one mortgagee, the other mortgagees, are also necessary parties.⁴ Other co-mortgagors are necessary parties to a suit for redemption by one of the mortgagors.⁵ Attaching creditor is not a necessary party to a mortgage suit,⁶ though he is a proper party,⁷ and so even an auction purchaser purchasing property during the pendency of mortgage suit need not be impleaded.⁸

If a subsequent mortgagee is not impleaded,⁹ or the prior mortgagee's suit against him is dismissed,¹⁰ his rights

¹ O. 34, R. 1.

² *Jamna Das v. Maniram*, 162 I. C. 15, 1936 (Pat.) 439.

³ O. 31, R. 1.

⁴ *Karrar Husain v. Jai Narain*, 100 I. C. 198; *Saed-ud-din v. Hiralal*, 12 A. L. J. 619.

⁵ *Ahmad Husain v. Muhammad Kasim*, 1926 (All.) 46, 24 A. L. J. 88, 90 I. C. 80.

⁶ *Baijulal v. Thakur Pd.*, 19 P. L. T. 781, 1938 P. W. N. 836.

⁷ *Ittiavira v. Krishna*, 28 T. L. J. 383, 12 T. L. T. 1015.

⁸ *Lalit Mohan v. Hardat Rai*, 1939 (Lah.) 146.

⁹ *Sukhi v. Ghulam Safdar*, 43 A. 469 (475, 476); *Ganpat Lal v. Bindasini*, 47 C. 924.

¹⁰ *Sheo Pd. v. Prakash Rani*, 171 I. C. 434, 1938 (Oudh) 10.

remain unaffected by the decree,¹ and he can sue for redemption within the prescribed period which was 60² years under Limitation Act, 1908, and is 30 years under the Act of 1963, and in the former case, the prior mortgagee can also bring a separate suit against him.³ If the omission is objected to at the trial, the suit cannot be dismissed, but a decree can be passed for sale of property not affected by the subsequent mortgage.⁴

A person claiming a title paramount to that of both the parties should not be impleaded in a mortgage suit,⁵ but if such a person has an interest in the mortgage security and his claim is not in any way in derogation of the rights of the mortgagor or the mortgagee, he should be impleaded notwithstanding that his claim is adverse to the plaintiff.⁶ A person claiming paramount title, if impleaded, may apply to be discharged. But if he does not apply and an issue is framed about his rights and is decided, it binds the parties.⁷ In a suit by a vendee of mortgage rights vendor may be joined and relief may be claimed against him in case plaintiff fails to get a decree against the mortgage property.⁸

SUITS BY, OR AGAINST, JOINT HINDU FAMILY

Members of a joint Hindu Family may sue or be sued in their individual names, but the manager may represent the family in all transactions relating to the joint family

¹ *Sailendra v. Amrendra*, 1941 (Cal.) 484; *Udhodas v. Gordharilal*, 1941 (Lah.) 96, 193 I. C. 656; *Rowshan Khan v. Abdul Khaliq*, 45 C. W. N. 705, 74 C. L. J. 1.

² *Priyalal v. Bohra Champaram*, 45 A. 268; *Amulya v. Raruli*, 1940 (Cal.) 150.

³ *Nanhelal v. Ram Bharose*, 174 I. C. 315, 1938 (All.) 115 (*Diss. in Baijnath v. Ramadhar*, 1963 A. L. J. 214, F. B. on another point).

⁴ *Alam Singh v. Gokal Singh*, 35 A. 484.

⁵ *Musammatt Radha v. Thakur Reoti Singh*, 20 C. W. N. 1279 (P. C.); *Gobardhan v. Munnalal*, 16 A. L. J. 639; *Rasoolam Bibi v. Ram Kunwar*, 155 I. C. 156, 1935 (All.) 205, 1934 A. L. J. 1177; *Niamba v. Narajan*, 1948 Nag. 369.

⁶ *Chettyar v. Narayanswami*, 196 I. C. 389, 1941 (Mad.) 710.

⁷ *Mst. Satwati v. Kalishankar*, 1955 All. 4 (F. B.).

⁸ *Khat Khata v. Surajpal*, 190 I. C. 334, 1940 O. W. N. 807.

property or entered into by him as such manager.¹ A decision in a suit by a managing member to establish a right in immovable property is therefore binding on the other members, and a decree obtained against him as manager for debts contracted by him or a deceased manager for family purposes will be binding on the whole Co-parcenary property² but a decree obtained against him personally can be executed against his share only. It is not necessary that a manager sued in his representative capacity should be so described in the plaint.³ But there is no presumption that whenever the manager is sued the members must be deemed to have been represented.⁴ The question always is whether he did represent the family in the proceedings or not. Where he had contracted debts for family purposes and was sued in respect of those debts, the presumption is that he was sued in his representative capacity.⁵

Where one R was one of the plaintiffs and other members of his family were defendants and one of the latter on his application was transposed as a plaintiff and was represented by another pleader, it was held that R could not be said to have sued as manager of the family but all members were parties in their individual capacity.⁶

In a suit on a mortgage of joint family property, all the members should be impleaded as defendants, but manager may ordinarily represent the junior members.⁷ The other members are proper though not necessary parties.⁸ In such cases it is always better to say in the plaint that a particular person sues or is sued as manager of a family, but even if

¹ Kallian Rai *v.* Kashinath, 1943 (All.) 188.

² Lingangowda *v.* Basangowda, 51 B. 450 (P. C.).

³ Harilal *v.* Munwan Kuer, 34 All. 549, 15 I. C. 126; Lal Chand *v.* Sheogovind, 1929 Pat. 741, 128 I. C. 331; Prithvipal *v.* Rameshwar, 1927 Oudh 27; Devidas *v.* Shri Shailappa, 1961 S. C. 1279.

⁴ Rangaswami *v.* Kandaswami, 1942 (Mad.) 732.

⁵ Mulgund Co-operative Society *v.* Shidhugappa, 1941 (Bom.) 385.

⁶ Labhu Ram *v.* Ram Pratap, 1944 (Lah.) 76.

⁷ Horilal *v.* Munman, 34 A. 549, 15 I. C. 126; 9 A. L. J. 819; Raja Ram *v.* Gopinath, 133 I. C. 416, 1931 (All.) 721.

⁸ Devidas *v.* Shri Shailappa, 1961 S. C. 1277.

there is no express allegation and circumstances show that the defendant was manager and that the property was joint family property the natural inference will be that he is sued in his capacity as manager.¹ If, however, every member of a family is impleaded including the manager without the latter being described as such, and one member is left out, the manager cannot be said to represent him,² or one who is a minor and for whom no guardian has been appointed.³ In such cases it cannot be argued that the manager represented him. In a Allahabad case a junior member was left out and a decree obtained against the others, it was held, that the decree and sale were binding on the whole family, the court presuming that some out of the members impleaded must be the manager as the member left out was junior to all who were impleaded and could not himself be the manager.⁴ But if the manager is the mortgagor himself he cannot, it is submitted, represent the interest of his junior members because he cannot question his own authority to make the mortgage. No doubt a suit can be brought against the mortgagor alone, and as he cannot plead that he was not authorised to make the mortgage, a decree can also be passed against him, but that decree will not be against him as representative of the family, and the other members can have it set aside on grounds ordinarily open to such members under the law.⁵

The widow of a deceased Co-parcener succeeding with her son under Hindu Women's Right to Property Act, 1937

¹ Sheo Shankar *v.* Jaddo Kuar, 36 A. 383, 21 I. C. 504 (P. C.); Prithipal *v.* Rameshwar, 99 I. C. 154, 3 O. W. N. 954; Rameshwar *v.* Bishambhar, 111 I. C. 174 (Oudh); Sethuratnam *v.* Chinna, 1930 (Mad.) 206; Ram Kishen *v.* Ganga Ram, 133 I. C. 1161, 1931 I. C. (Lah.) 559; Mukhram *v.* Kesho Pd., 162 I. C. 879, 1936 (Pat.) 258; Bhagwandas *v.* Radha Kishan, 164 I. C. 69, 1946 (Sind.) 87; Trimbak *v.* Sonkaran, 1948 Nag. 324.

² Ganganand *v.* Sri Rameshwar Singh, 102 I. C. 449 (Pat.).

³ Chandi Prasad *v.* Balaji, 129 I. C. 560, 1931 A. L. J. 152, 1931 (All.) 136.

⁴ Deo Narain *v.* Phagu, 121 I. C. 817, 1930 (All.) 541.

⁵ Nathu *v.* Ram Sarup, 23 A. L. J. 246, A. I. R. 1925 (All.) 335.

is not an heir but continues to be member of a joint family and the son is entitled to represent her also in a suit on a pronote belonging to the joint family and to bring a suit without impleading her.¹

If any of the junior members wishes to be joined in the mortgage suit the Court should implead him as a proper party.²

SUITS AGAINST FOREIGN RULERS, AMBASSADORS AND ENVOYS

(1) No ruler of a foreign State may be sued in any court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government :

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a ruler from whom he holds or claims to hold the property.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the court in which the Ruler may be sued, but it shall not be given, unless it appears to the Central Government that the Ruler—

- (a) has instituted a suit in the court against the person desiring to sue him, or
- (b) by himself or another, trades within the local limits of the jurisdiction of court, or
- (c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or
- (d) has expressly or impliedly waived the privilege accorded to him by this section.

(3) No Ruler of a foreign State shall be arrested under this Code and, except with the consent of the Central

¹ Markipudi v. Madanamchedu, 1943 (Mad.) 708.

² Moti Ram v. Lal Chand, 170 I. C. 192, 1937 (Nag.) 121.

Government certified in writing by a Secretary to that Government, no decree shall be executed against the property of any such Ruler.

(4) The preceding provisions of this section shall apply in relation to :—

- (a) any Ambassador or Envoy of a foreign State;
- (b) any High Commissioner of a Commonwealth country; and
- (c) any such member of the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf.

As they apply in relation to the Ruler of a foreign State. (Section, 86 C. P. C.).

The Ruler of a foreign State may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in section 86, the Central Government may direct that the Ruler may be sued in the name of an agent or in any other name, (Section 87, C. P. C.).

SUIT BY ALIENS

Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such court.

Explanation—Every person residing in a foreign country the Government of which is at war with India and carrying on business in that country without a license in that behalf granted by the Central Government, shall, for the purpose of this section be deemed to be an alien enemy residing in a foreign country.¹

¹ S. 83, C. P. C.

SUITS BY FOREIGN STATES

A foreign state may sue in any competent court :
Provided that the object of the suit is to enforce a private right vested in the Ruler of such state or in any officer of such state in his public capacity.¹

For the purposes of above provisions SS. 83, 84, 86, 87, C. P. C.) "foreign state" means any State outside India which has been recognised by the Central Government; and

"Ruler" in relation to a foreign State means a person who is for the time being recognised by the Central Government to be the head of that State.

Every Court shall take judicial notice of the fact that

- (a) A State has or has not been recognised by the Central Government;
- (b) A person has or has not been recognised by the Central Government to be the Head of a State.²

SUITS AGAINST RULERS OF FORMER INDIAN STATES

The Provisions of S. 85 and sub-sections (2) & (3) of S. 86 (quoted above) apply also to Suits against rulers of former Indian State as they apply in relation to the Ruler of a foreign State.

Former Indian States are those as are specified by the Central Government in a notification in the official Gazette for the purpose, and a Ruler of a former Indian State means the person who for the time being is recognised by the President as the Ruler of that State for the purposes of the Constitution.³

SUITS BY, OR AGAINST, INSOLVENTS AND THEIR
RECEIVERS

On the making of an adjudication order, the whole property of an insolvent vests, in the Presidency towns, in

¹ S. 84, C. P. C.

² S. 87 A, C. P. C.

³ S. 87 B, C. P. C.

the official assignee,¹ and in the Mofassil, in the court or in a receiver appointed by the court.² No suit can therefore be brought in respect of such property by or against the insolvent, but such suits, should be brought by or against the official assignee or the receiver. The title of the suit should be as follows :—

“The official assignee of the property of CD, an insolvent.”²

“A B, Receiver in insolvency of the property of CD, an insolvent.”

“AB the official receiver for the district of Patna and receiver of the property of CD, an insolvent.”

But the insolvent has a right to bring a suit in his own name and can be sued personally in respect of any property which does not under the law vest in the receiver or for damages or cost. An insolvent cannot be sued for debts provable in insolvency without the leave of the court⁴ previously obtained.⁵ Notice under Section 80, C. P. C. is necessary before a receiver can be sued.

SUITS BY, OR AGAINST, RECEIVERS (For receiver of insolvent, see *Supra*)

A receiver appointed by court under Order XL, C. P. C. can sue with the leave of the court, and he cannot be sued without such leave, which should ordinarily be obtained before the suit but the defect of omission to obtain such leave before hand can be cured by subsequent leave.⁶ As a general rule when a suit is instituted by or on behalf of a receiver, the authority of the court under which the receiver sues should be specifically alleged in the plaint. Reference

¹ S. 17, Presidency Insolvency Act.

² S. 28, Provincial Insolvency Act.

³ S. P. 3, Presidency Towns Insolvency Act.

⁴ S. 17, Pr. Towns, & S. 28 (2) & (6), Provl. Insolvency Act.

⁵ *In re Dwarkadas*, 40 Bombay 235; *Ghous Khan v. Bala*, 15 Madras 833.

⁶ *Srihari v. Satya*, 1926 (Cal.) 1090; *Karooth v. Manavikraman* 43, Mad. 793.

to the sanction obtained should also be made in the plaint when a suit is filed against a receiver. A receiver being an officer of the court, notice under section 80, C. P. C. is necessary before he can be sued. A suit instituted without leave must be dismissed if objection is taken, but according to the Cal. H. C. the omission to take objection is tantamount to waiver and the suit cannot be dismissed.¹ A suit may be brought by the receiver in his own name or the name of the owner of the property but must be brought in his own name if the court authorizes him to do so.²

SUITS BY, OR AGAINST MINORS AND LUNATICS

A minor or lunatic cannot sue or be sued himself but must sue through a next friend, and if a defendant, a guardian *ad litem* must be appointed by the court to represent him. The only exception is the case of a minor who sues in a Presidency Small Cause Court for his wages or for work done by him as defendant's servant and whose claim does not exceed Rs. 500. S. 32 of Presidency Small Cause Court permits such suit to be instituted without a next friend.

If a person is adjudged lunatic by a court and a curator is appointed, he can sue or be sued by such curator.

(For forms of cause title or suits by or against minors and lunatics see Chapter XIII).

As a minor is incompetent to contract, no suit based on contract can be instituted against him, but he can bring a suit for rescission of a contract or cancellation of an instrument executed by him. He may also sue to enforce a contract made in his favour,³ except contracts under which he has to discharge certain onerous obligations himself.⁴ A minor, can, however, be sued for damages resulting from

¹ Satya Kripal v. Satya Bhupal, 18 C. W. N. 596.

² Achut v. Shivaji Rao, 1937 (Bom.) 294.

³ Munni v. Madan Gopal, 38 All. 62, Munia v. Premanand, 37 Mad. 390; Zafar v. Zubaida, 1929 (All.) 609; Raghva Chariar v. Srinivas, 40 Mad. 308; Ramgaraju v. Madura, 24 M. L. J. 363.

⁴ Pramela v. Jogeshwar, 3 Pat. L. J. 578.

his tort, but if a particular intention or knowledge or state of mind is an essential element of the tort (e. g., in case of fraud) the age and mental capacity of the minor is then taken into consideration. But the tort must be independent of a contract, thus, when a minor obtains a loan by fraudulent representation of his age, he cannot be sued for damages for fraud.¹

¹ *Leslie v. Shell*, (1919) 3 K. B. 60.

CHAPTER XIII

Plaint

Plaint

Having considered the preliminary matters for framing a suit, the next question is how a suit is instituted. It is instituted by filing a plaint, which is the first pleading in a civil suit. It is a statement of the plaintiff's claim and its object is simply to state the grounds upon, and the relief in respect of which, he seeks the assistance of the court. It consists of the following three essential parts :

Part I—The Heading and Title.

Part II—The Body of the Plaint.

Part III—The Relief Claimed.

Part I—Heading and Title.

Heading

Every plaint should begin with the name of the court in which the suit is brought,¹ to be written at the head of the plaint and this is called its heading, e. g., "*In the Court of the Civil Judge at Allahabad.*" It is not necessary to add the name of the presiding officer of the court. Where a court, e. g., the High Court, has various jurisdictions, the jurisdiction in which the suit is brought should be stated below the name of the court, thus—

In the High Court of Judicature, at Bombay
Testamentary and intestate jurisdiction

Or

Matrimonial Jurisdiction

Or

Ordinary original Civil Jurisdiction.

Then follows the number of the suit in the next line. The number is noted by the court officials and a place should be left blank for it. The year should be written thus—

¹ O. 7, R. 1 (a).

Original Suit No.—of 1972,

Or

Title Suit No.—of 1972,

Or

Suit No.— of 1972.

according to the practice of the Court.

Next to the heading, should be written the “Title” Title
or “Cause Title” consisting of—

- (i) The name, description and place of residence of each plaintiff; and
- (ii) The name, description and place of residence of each defendant.¹

The word “description” includes the name of the father, age, and any other particulars necessary to identify a person. There can be no hard and fast rule as to what description should be given. In the case of a Christian, father’s name would not be necessary, but full name—Christian name and surname— should be given. The titles by which a defendant is generally known should also be given, e. g., titles which the Government has conferred or recognised. The Privy Council has held that “if the plaintiff, from animosity, pique or anything, in fact, but a *bona fide* dispute as to the right to a title, obstinately refuses to amend the plaint by insertion of such titles, the plaint should be rejected.”²

When a practice existed in the Madras Court to give, as part of the description, the age as well as the father’s name, and these were not given, the High Court refused to interfere with an order rejecting the plaint.³

If a defendant is not properly named or described, but the real person intended has been properly served with a summons and he does not appear to defend the suit a

¹ O. 7, R. 1 (b).

² Maharaja of Vizianagram *v.* Lakshmi Challaya, 18 W. R. 30, 12 B. L. R. (P. C.) 445.

³ Somayajulu *v.* Suvayya, 7 M. L. J. Rep. 81.

judgment passed against him in such name will be as effective as if true name and description had been given in the complaint, and the correct name and address can be substituted at any subsequent time when they are discovered, because names are used only to designate persons, and the suit is not against names but against persons designated thereby.

When there are several plaintiffs or several defendants, each should be described properly and it is always more convenient to give a serial number to each of them so that they may be easily referred to in the pleadings. The order in which the names of several defendants are mentioned is generally immaterial, but it is always more convenient to mention them in the order in which they play their part in the story told in the complaint. For instance, in a suit on a mortgage to which the mortgagor, his two minor sons, and two subsequent transferees are impleaded as defendants, the mortgagor should be the first defendant, the sons, the second and third defendants and the transferees, the fourth and fifth defendants in the order of the dates of their assignments. Defendants against whom no relief is claimed but who are added as a matter of form should figure last of all. Sometimes when there are several sets of defendants, each set interested in a portion of the claim only, it is better to describe the several sets as "defendants, first party," "defendants, second party," "defendants, third party," etc.

A minor cannot sue or be sued except through a next friend or guardian. Where any of the parties is a minor or a person of unsound mind, he should be so described¹ in the cause-title, and the name and description of the person through whom he sues or is sued should also be stated, thus:—

"AB, son of....., a minor, by CD, son of.....
his next friend.....plaintiff"

versus

"EF, son of... .., a minor, through his
guardian, GH, son of....., defendant."

¹ O. 7, R. I (d).

“AB, son of....., a person of unsound mind, by his next friend, CD, son of.....”

“AB, son of....., a person adjudged by court to be a lunatic, by CD, son of.....his curator, appointed by the court.....”

As a guardian *ad litem* of a defendant under disability has to be appointed by court, under the special procedure prescribed in Order XXXII, and as it is not necessary that the person originally proposed by the plaintiff should ultimately be appointed, it is more convenient not to mention the name of the proposed guardian in the plaint, but to leave a blank to be filled up by the court with the name of the person appointed by it. This is actually the practice at some places. The general practice, however, is to enter the name of the proposed guardian in the plaint and to leave it to the court to substitute for it the name of any other person who is ultimately appointed. There is no objection to either of the practices, and if there is no specific rule on the point, there is no harm in the pleaders sticking to local practice or to act under any local orders that may be issued in this behalf.

In some districts it is the practice to file with the plaint in a suit on behalf of a minor, an affidavit showing the fitness of the next friend to act as such. On the original side of the High Courts in the Presidency towns this is made obligatory by the rules of procedure.¹

Though there is no provision in the Code to require that when a party sues or is sued in his representative character, he should indicate that fact in the “cause-title” of the plaint also, in addition to making a statement to that effect in the body of the plaint (as required by O. 7, R. 4)² yet that

¹ See High Court Original side rules 7, Calcutta, Chap. XIX 21; Bombay, Chap. XIX, Rule 388, Madras 80 Rule 2, Rangoon, Part II, Chap. I, Rule 64.

² *Sonacholam v. Kumaravelu*, 109 I. C. 199, 45 M. L. J. 587, 1928 (Mad.) 445; *Bidlu v. Kulada Prasad*, 50 I. C. 525, 46 C. 877.

seems to be a convenient place to state it¹ and the forms given at No. (2) in Appendix A to the First Schedule of the Code indicate that this is as necessary in this country as it is in England. Such description should be in the following form:—

“AB, son of.....suing on behalf of himself and of all the Hindu residents of village.....”

Or

“AB, and CD, managing trustees of the¹ Arya Kanya Pathshala.”

Or

“AB, son of....., as manager of a joint Hindu family.”

Or

“AB,....., as administrator of the estate of CD, deceased.”

But want of this description would not render the plaint bad, provided the fact that the person sues or is sued in the representative capacity is stated in the body of the plaint.² Also if a person is sued in two capacities it is not necessary that he should be named twice in the title but it would be sufficient if the two capacities are mentioned in the plaint.³

Part II.—Body of the Plaint.

The second part of a plaint is its body, which is the plaintiff's statement of his claim and of other matters which he is legally required to state. It is drawn up in the form of a narrative in the third person, and is divided into short paragraphs, each containing ordinarily one fact and one fact only. The statement is prefaced by words to the following effect :

“The above-named plaintiff states as follows :—”

¹ Kuarmani Singha *v.* Wasif Ali, 28 I. C. 818, 19 C. W. N. 1193; Deolal *v.* Tularam, 1928 (Nag.) 319, 109 I. C. 785.

² Bidhu *v.* Kulada Prasad, 50 I. C. 525, 46 C. 877; Jagat Tarni Dasi *v.* Prafulla Chandra, 35 I. C. 792 (Cal.); Deolal *v.* Tula Ram (Supra); Haji Mahomed Nabi *v.* Province of Bengal, 46 C. W. N. 59.

³ Jatis Chandra *v.* Kshirod, 1943 (Cal.) 319, 47 C. W. N. 186, 76 C. L. J. 83.

It is composed of two portions : (1) the formal portion, and (2) the substantial portion.

The formal portion consists of the following particulars :—

- (i) A statement as to when the cause of action arose;¹
- (ii) Facts showing that the court has jurisdiction;²
- (iii) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees so far as the case admits,³
- (iv) When any party is a minor or a person of unsound mind, a statement to that effect.⁴
- (v) When the plaintiff sues in a representative character, a statement to that effect, coupled with a statement that he has taken the steps (if any) necessary to enable him to institute the suit;⁵ and,
- (vi) When the suit is instituted after the period of limitation, a statement showing the ground on which exemption from the law of limitation is claimed.⁶

Each of these particulars should better be stated in a separate paragraph of the plaint, but as particulars (i) and (ii) are stated in one paragraph in the Forms given in Appendix A of the Code, and as O.6, R. 3 requires that these forms or forms of like character shall be used for all pleadings, these two particulars may be alleged in one paragraph, thus:

“The cause of action for the suit arose on June 23, 1925, and the defendant resides within the jurisdiction of this Court.” It is not, however, of much consequence that these particulars are not stated in a separate paragraph each, provided that they are to be found somewhere in the body of the plaint.⁷

¹ O. 7, R. 1. (e).

² O. 7, R. 1 (f).

³ O. 7, R. 1 (i).

⁴ O. 7, R. 1 (d).

⁵ O. 7, R. 4.

⁶ O. 7, R. 6.

⁷ Kalyani v. Ganesh, 3 C. W. N. 991.

Date of
cause of
Action

The date of the cause of action should be correctly given. When it was given as "previous to August 21, 1869" and the plaint did not show that it was not barred by time, it was ordered to be taken off the file.¹

It is not always easy to determine what date should be mentioned as the date of the accrual of the cause of action and pleaders often make mistakes in this respect. The language of the rule (O.7, R. 1, Clause (e), is not, unfortunately, clear and definite. It requires that a plaint should contain "the facts constituting the cause of action and *when it arose*." Under the first part of this clause are of course alleged (in the body of the plaint) facts which are essential for the plaintiff to prove in order to obtain the relief claimed by him, but surely it cannot have been intended that the dates of all these facts should be mentioned under the second part of this clause. For instance, the cause of action for a suit for damages for breach of contract would be the contract, its breach, and the resulting damages, but it would not be accurate to say that the cause of action for the suit arose on the date of the contract. The date of accrual of cause of action to be mentioned in the plaint is, it is submitted, the date of that event which makes the cause of action for the suit complete, in other words which gives the plaintiff the right of suit, e. g., in case of breach of contract, the date of the breach. It should be distinguished on the one hand from the date of any other previous fact which is part of the cause of action, (e. g., date of the contract), and, on the other hand, from that of any subsequent event which is not material as part of the cause of action, though it may have been the exciting cause for the suit (e. g., the date of demand of damages and defendant's refusal). But a mere inaccuracy in the date, e. g., giving the date of contract instead of the date of breach, is not fatal if defendant is not prejudiced thereby.² If all the facts constituting the cause of action are correctly

¹Sonamul v. Sunara, 8 B. L. R. App. 23.

²Abdul Shakur v. Rajendra Kishore, 1935 (All.) 759, 155 I. C. 1092.

narrated, a wrong inference as to the date of accrual of cause of action is not fatal.¹

As the object of this allegation is presumably to determine whether the suit is within time, it is ordinarily best to mention the date of the starting point limitation as that of the accrual of the cause of action, as this would be found in the majority of cases to be the date of the last fact going to make up the cause of action. It may be taken as a general rule that cause of action for a suit on the basis of contract arises on the date of its breach, and that for a tort, on the date on which the tortious act is committed, and the accrual of damages to the plaintiff is immaterial, except in case of an act not actionable without special damages, in which case the accrual of such damages will be the date of the accrual of cause of action (e. g., in suits for public nuisance). In some cases of contract, the dates of the contract and of its breach are the same, e. g., in suits on bonds or promotes payable *on demand*, money under which is payable forthwith or immediately. Similarly, a loan taken without a definite promise for repayment is also considered to be repayable forthwith and the cause of action for a suit for recovery of such a loan is the date thereof. If there is a series of loans, it may be more convenient to say that "the cause of action arose between—and—, on the day each loan was taken" instead of giving the date of each loan.

The date should therefore be the actual date on which the event constituting the cause of action for the suit happened, and it is not right to state the date of the happening of any subsequent event. For instance, in a bond suit, the date of the bond or the date of payment fixed in it should be stated and not the date on which money was last demanded and refused. Similarly, in a suit for ejectment, the date on which the defendant took wrongful possession or the date on which plaintiff's right to take possession accrued (as

¹ Firm Sitaram Bindraban v. G. I. P. Ry., 1947 Nag. 224.

the death of a Hindu widow, or the death of the person from whom plaintiff claims to inherit), should be given, and not the date on which the defendant refused to hand over the property to the plaintiff. A practice has grown up, at least in the Uttar Pradesh, of making an allegation, in almost all complaints, that the plaintiff asked the defendant to return the property wrongfully withheld by him, or to pay the money due from him, or to remedy the particular wrong committed by him, and the defendant refused to comply with the demand, and the date of this refusal is usually given as that on which the cause of action arose. Some pleaders not only give the right date on which the cause of action actually arose, but they even add the date of this subsequent demand and refusal also. It is usual to find such allegations as the following :—

“The cause of action arose on June 30, 1919, when the defendant took possession of the house, and again on June 23, 1925, when he refused to deliver it back to the plaintiff.

Demand
before suit

These allegations of demand and refusal are, in the majority of cases, false, and are, in any case, unnecessary, and should find no place in the complaint, nor should the date of any such demand be given as the date of the cause of action. There are, of course, cases in which a demand is necessary and such a demand alone gives a cause of action for the suit, e. g., in a suit for refund of money deposited with a banker or, on a promissory note payable on the expiry of a fixed period after demand, or for accounts against an agent during the continuance of the agency. In fact, whenever money is payable only when demanded by the creditor, a demand has to be made before the suit and such demand alone furnishes the cause of action. The words “*on demand*” used in bonds, bills of exchange and promissory notes are not, however, used in the sense of being payable only when demanded, but in the legal sense of being payable forthwith or immediately, and without demand, and no demand is

necessary before bringing a suit on them.¹ The limitation also runs in such cases from the date of the bond, bill or note. In a case in Madras, as the mortgage bond provided for payment of interest every month and the principal when demanded, it was held that the principal did not become due until it was actually demanded.² In cases when money is payable on a fixed date, no demand is necessary. In cases of recovery of damages for breach of contract or for tort demand is not necessary before suit, nor is it necessary before a suit for recovery of property taken wrongfully by the defendant. No demand for rent is necessary as a lessee is bound to pay it under Sec. 108 (i), Transfer of Property Act.³ If A undertakes to pay money to C on behalf of B but no time for payment is specified no cause of action arises against A until payment is demanded by either B or C.⁴ It may roughly be taken as a general rule that demand is necessary in all cases in which limitation runs from the date of demand.

Whenever, therefore, no demand is necessary to give a cause of action for the suit, it is not material to allege it even if it has been made, much less is it correct to give the date of such demand and refusal as that of the accrual of cause of action. If, however, in such a case the defendant pleads his readiness to pay and claims exemption from cost, the plaintiff can prove that he had made a demand as it would then become a relevant fact. In cases in which demand is necessary before a suit, it should be pleaded, and the date of such demand and refusal will be the date of the cause of action. Even in such cases, the first demand would furnish cause of action and any subsequent demands are not material

¹ *M. Chetty v. Palaniappa*, 13 Bur. L. T. 21; *Secretary of State v. Prasad Bafull*, 46 M. 259; *Meghraj v. Johnson*, 11 N. L. R. 189; *Sheikh Jamu v. Muhammad Ibrahim*, 1926 (Nag.) 194; *Framroz v. Mohammad Essa*, 1920 (Bom.) 241, 28 B. L. R. 141.

² *B. R. Swanly v. The Official Assignee*, 19 M. L. J. 474, 1925 Mad. 1120.

³ *Allibhoy v. Jiwanji*, 111 I. C. 530, 1929 (Sindh) 13.

⁴ *Ram Ratan v. Abdul Wahid*, 49 A. 603, 101 I. C. 601, 25 A. L. J. 411.

and should not be alleged. The allegation that money was demanded several times, but always refused and the cause of action arose from the last refusal is therefore clearly unnecessary

Jurisdiction

It is also not unusual to find in complaints a vague statement to the following effect : "That the court has jurisdiction to try the case" or "The Court has in every way jurisdiction over the case." What is really required is a statement, not of the fact that the court has jurisdiction, but of *the facts showing that the court has jurisdiction*. A plea in the complaint that the Court has jurisdiction to entertain the suit is technically defective where it does not allege how and where the cause of action arose in terms of Secs. 16, 17, 19 and 20 C. P. C.¹ These Sections lay down the rules for determination of the *forum* for a suit. Briefly, the provisions are that all suits relating to immovable property or for recovery of movable property under distraint or attachment, must be filed in the court within the local limits of which the property happens to be. In all other cases, a suit should be instituted, either where the cause of action or any part of it arose, or where all the defendants reside or carry on business or personally work for gain, or even where some of the defendants reside, provided others acquiesce in such institution or leave of the court has been obtained. A suit to obtain relief respecting, or compensation for injury to immovable property may, in cases where such relief can be entirely obtained through the defendant's personal obedience be instituted where the defendant resides, if the plaintiff so wishes. Some times in mercantile contracts parties agree that any suit arising out of the contract should be instituted at a particular place. Such a contract has been held to be legal,² and should be alleged in the complaint to show that the court has jurisdiction. The complaint should therefore show on which of the above grounds the court has jurisdiction.

¹ Krishna Swamy v. Raja C. Reddiar, 1942 Mad. 614.

² Kondepu v. Elukkoru, 1944 (Mad.) 47, 1943 M. W. N. 703.

For example, "That the defendants reside within the jurisdiction of this Court" or "That defendants Nos. 2, 3 and 4 reside within the jurisdiction of this Court, and, though defendant No. 1 does not, an application is being made for leave to sue in this Court," or "That the property in respect of which this suit is brought lies within the jurisdiction of this Court" or "That the bond was executed and money borrowed at Simla, within the jurisdiction of this Court," or "That the money payable under the contracts was made payable at Meerut, within the jurisdiction of this Court," or "That the defendant caused the wrong complained of in this plaint at Agra, within the jurisdiction of this Court." These facts should be clearly stated in the body of the plaint and not left to be inferred, e. g., if jurisdiction is claimed on the ground of residence it is not sufficient that the residence of the defendant is stated in the heading of the plaint.¹ In a suit for possession of property situated in Burma and Madras, the following statement in the plaint was held to be defective as it did not show how and where the cause of action arose in terms of Secs. 16, 17 and 20, C. P. C. :—"The cause of action arose at Srirangam, Tiruvanaikoil, Manakkal etc. villages in the Trichinopoly district within the jurisdiction of this court."²

The plaintiff must distinctly and separately give in his plaint the valuation of his claim for the purposes of court-fees and of jurisdiction, though both may be stated in one paragraph. The two valuations are entirely different in character, though in most cases they may be the same. The valuation for the purposes of the court-fee is required in those cases only in which court-fee is charged, under the Court Fee Act, on the valuation, i. e., *ad valorem*, e. g., in suits for recovery of money, property, etc. In such cases the object of the rule is to enable the court to check, with reference to the valuation given in the plaint, whether the

Valuation
of suit

¹ Ram Prasad *v.* Hzarimull, 134 I. C. 538, 1931 (Cal.) 458, 58 C. 418.

² Krishnaswami *v.* Venugopala, 1942 (Mad.) 612.

(i) For
Court fee

court-fee paid is sufficient or not. If court-fee is payable on the value of the property, as in the case of a suit for possession of a house, that value should be stated, but where some other basis has been prescribed for computing the court-fee the basis on which court-fee is calculated as well the amount calculated on that basis should be stated.

In suits for which a fixed court-fee is payable, e.g., in suits for declaration without a consequential relief, no value for the purposes of court-fee need be given, but it may be alleged that a fixed fee has been paid on the plaint. Where a claim embraces several distinct causes of action, as a suit on several bonds, the valuation of claim in respect of each such cause of action should be separately given, as court-fee is separately payable on each.¹ But where several claims or reliefs arise out of the same cause of action, the valuation of the suit is the aggregate of the valuations of all the claims or reliefs.² For instance, in a suit on two bonds, the valuation should be stated thus :—"For purpose of court-fee, the value of the claim on the bond of 1923 is Rs. 405, and that of the claim on the bond of 1924 is Rs. 302. The value for purposes of jurisdiction is Rs. 707." (It should be noted that court-fee calculated separately on Rs. 302 and Rs. 405 will be more than that calculated on Rs. 707). In a suit for possession of a house valued at Rs. 1000,, and for recovery of Rs. 500 damages for wrongful possession, the allegation should be : "The value for the purposes of jurisdiction and court-fee is Rs. 1,500, because the two claims arise out of the same cause of action."

When, however, alternative reliefs are claimed, the value for the purpose of court-fee is the value of the larger relief.³ An additional claim for mesne profits or interest from the date of suit to the date of possession or realization does not require a court-fee and need not therefore be valued

¹ Section 17, Court-Fees Act.

² *Surajpal v. Jagarnath Pd.*, 1954 A. L. J. 710.

³ *Kashinath v. Govind*, 15 B. 82; *Mukhalal v. Ramdheyani*, 44 1. C. 143 (Pat.).

at all.¹ Requiring a defendant to demolish certain construction illegally made by him is claim for a mandatory injunction and the relief for it must be valued as laid down in S. 7 (IV-B) (b) of the Court Fees Act.²

Valuation of a claim for the purpose of jurisdiction is required in order to determine whether the suit is within the pecuniary jurisdiction of the court, and also further, for determining the *forum* of appeal. In some cases this is required also for determining the amount of process-fee required to be paid, as, under rules framed by some High Courts, that fee often varies according to the value of the claim. (ii) For Jurisdiction

There is no difficulty about valuing the suit when *ad valorem* court-fee is payable, as in all such cases (except those referred to in Sce. 7, paras. V, VI, IX, and X (d) of the Court-Fees Act), the value for purposes of jurisdiction is the same as that for the purposes of court-fee.³

There are, however, certain suits, the subject-matter of which does not admit of being satisfactorily valued. Prominent instances of such suits are those the subject-matter of which is incapable of being estimated at a money value. The Court-Fees Act has, in all such cases, prescribed a fixed fee to be payable. Section 9 of the Suits Valuation Act provides that such suits are to be valued according to the rules to be framed by the High Courts. If any such rules have been framed, valuation shall be made accordingly but where no such rules have yet been framed, a plaintiff is entitled to put his own valuation on such claims.⁴ Such valuation is necessarily arbitrary, but it *prima facie* determines the jurisdiction of the court, though a defendant may take an objection of under-valuation, or over-valuation, in which case the

¹ Vithal v. Govind, 17 B. 141.

² Banwarilal v. Ram Gopal, 1957 A. L. J. 438.

³ Section 8, Suits Valuation Act.

⁴ Zair Hussain v. Khursheed Jan, 28 A. 545, 3 A. L. J. 266; Jan Muhammad v. Mashar Bibi, 34 C. 352, 11 C. W. N. 458, 5 C. L. J. 400; Jasoda v. Chhotu, 34 B. 26 (all cases of restitution of conjugal rights; Sheo Dueni v. Tulsi, 15 A. 378 (suits for setting aside an adoption.)

question will be determined by the court. The court at Madras has held that this is not the best mode of valuation of suits which affect property, and that in such cases, the suits should be valued according to the value of the property affected thereby.¹ For purposes of jurisdiction of a suit for possession of land, the value of garden and building standing on the land is to be taken into account, even though no possession is sought over the garden and the building.²

Allegation
of minority
or insanity
of a party

It is not quite clear whether the description in the cause-title of the case is sufficient compliance with the rule which requires that where a plaintiff or a defendant is a minor or a person of unsound mind, a *statement to that effect* shall be contained in the plaint. Having regard to the practice in England, it is better that such statement should be contained in the body of the plaint also. This statement should be made in the beginning of the plaint, preferably in the first paragraph thus :

“1. The Plaintiff is a minor, and so are defendants Nos. 4 and 5, and defendants Nos. 1 and 2 are persons of unsound mind.”

The name of the proposed guardian *ad litem* need not be stated in the body of the plaint.

Plaintiff's
representative
character

If the plaintiff sues in a representative character, that fact should also be stated in the opening paragraphs of the plaint, thus :

“The plaintiff is the official receiver of the property of AB, son of.....who has been adjudged insolvent by the District Judge, varanasi under an order, dated, and sues as such.”

Or

“The plaintiff is the manager of a joint Hindu family

¹ Ram Krishnamma v. Bhagamma, 15 M. 56; Ramu v. Sankara Aiyer, 31 M. 98 (Suit for compulsory registration) Krishna v. Raman, 11 M. 266 (suit for removal of a Karnavan); Keshava v. Lakshminarayana, 6 M. 192 (suit for setting aside an adoption.)

² Shanti Pd. v. Ch. Mahabir Singh, 1957 A. L. J. 431 (F. B.).

composed of himself and his sons, and sues as such.”

Or

The plaintiffs are Hindu residents of village..... and as the number of other Hindu residents of the said village, who are interested in the subject of this suit to the same extent as the plaintiffs, is large, plaintiffs bring this suit on behalf, and for the benefit of all Hindu residents of the said village.

If a plaintiff has, under any law, to take any preliminary steps before being entitled to bring a suit in a representative capacity, he must also state that he has taken those steps. For instance, a suit to establish a right to the estate of a person dying intestate to whom the Indian Succession Act applies cannot be instituted unless letters of administration have been obtained.¹ Therefore the plaint should contain an allegation that the plaintiff has obtained the letters of administration. For this reason, a plaintiff claiming a debt or security by survivorship cannot be allowed to succeed as an heir as in that case a succession certificate would have been required.²

Preliminary Steps

But, when the obtaining of any authority, e. g., a Probate or Succession Certificate, is laid down only as a condition precedent to the passing of the *decree*, it is not absolutely necessary that it should be obtained before the suit, and it has been held that it is sufficient if such Probate or Certificate is obtained and produced before the court is called upon to pass a decree.³ Therefore it is not necessary to allege in the plaint that the plaintiff has obtained a Probate or a Succession Certificate, because obtaining this document is not a step necessary to entitle the plaintiff to sue.

If a claim is *prima facie* barred by limitation, and the plaintiff claims it to be within time by reason of any of the

Limitation

¹ Setna v. Hemingway, 38 B. 618; Meyappa v. Subramanian, 43 I. A. 113.

² Kamlakant v. Madhavji, 1935 (Bom.) 343, 37 Bom. L. R. 405.

³ Chandra Kishore v. Prasanna Kumari, 38 C. 327; Jamshedji v. Hiraji, 37 B. 158; Mangal Khan v. Salimulla, 16 A. 26; Kalian Singh v. Ram Charan, 18 A. 34.

exceptions to the general rule of limitation (i.e., under any of the Sections of the Limitation Act), the ground upon which exemption is claimed shall be shown in the plaint,¹ but when the claim is not *prima facie* barred by limitation, no additional facts bringing the case also within an exception need be alleged.² If the claim is *prima facie* barred by the general rule of limitation, and the ground of exemption is not alleged, the plaint is liable to be rejected under rule 11 (d) of Order 7. It should be noted that the rule does not require that the ground of exemption should be *specifically* stated. All that it requires is that the plaint should *show* the ground of exemption.³ For instance, it is sufficient if a part payment in the handwriting of the defendant is alleged to have been made within limitation; it is not necessary that it should be expressly alleged that the plaintiff claims limitation from that date. But, in spite of this, it is always better and more proper to make a specific allegation, in a separate paragraph of the plaint, of the ground of exemption claimed by the plaintiff. This allegation should be made very clearly so as to bring the case within one of the recognized exceptions. For instance, if a payment has been made, it is not sufficient to say that so much was paid on such and such date, therefore the suit is within limitation, but it must be stated that it was made towards the debt in suit by the debtor or his agent and that the acknowledgment of payment was made or signed by the person making the payment. Before 1942 payment of interest, in order to save limitation, should have been made "as such." There used to be considerable conflict of judicial opinion on the interpretation of these words. Those rulings have now

¹ O. 7, R. 6, C. P. C.; Badruddin Khan v. Mayhor Khan, 1938 A. L. J. 1189; Ramaswami v. Anaiya Padyachi, 1962 Mad. 210.

² Raghunath v. Sayyad Samad, 12 C. W. N. 617, 7 C. L. J. 560; Gangadhar v. Abdul, 11 C. L. J. 34, 14 C. W. N. 128.

³ Deo Raj v. Shiva Ram, 25 I. C. 368, 74 P. R. 1914, 260 P. L. R. 1914, 165 P. W. R. 1914; Kamla Devi v. Gurdayal, 17 A. L. J. 330, 51 I. C. 283; Mangli v. Gaya Prasad, 1947 Oudh 235.

become obsolete. The Amending Act of 1942¹ brought about a change and all that is required is that the payment should have been made on account of the debt and the acknowledgment should have been signed as stated above. But if the payment of interest was made before January 1, 1928 no written acknowledgment is necessary.²

It has been held that this rule should not be strictly construed. Thus, when a suit was filed on the re-opening of the courts after the summer vacation and its period of limitation had expired during the vacation, it was held that the court should take judicial notice of the holidays and the suit should not be dismissed on the ground that the fact is not mentioned in the plaint.³ Similarly, it has been held that when after the plaint has been returned for presentation to the proper court, it is presented to the latter court after the period of limitation, no statement under this rule was necessary as the endorsements required by O. 7, R. 6, C. P. C. were sufficient compliance.⁴ But as it is not in all cases that the time during which a suit remained pending in the former court can be excluded from the period of limitation, it is submitted, that the endorsements alone cannot be sufficient to show the ground of exemption from limitation. Before Section 14 of the Limitation Act can be applied, it has further to be shown that the plaintiff was prosecuting the suit in the former court with due diligence and in good faith, and an allegation to that effect should be made in the plaint if the benefit of Section 14 is claimed.

If a plaint does not show the ground of exemption, the plaintiff cannot be allowed to raise it,⁵ nor can any

¹ Act XVI of 1942.

² Proviso to Section 20 (1) of the Limitation Act, 1908 (=S. 19 of Act 1963).

³ *Tek Chand v. Paltu*, 56 I. C. 926, 16 N. L. R. 198.

⁴ *Sukhbir Singh v. Piare Lal*, 1923 (Lah.) 591; *Yereni v. Vappulapati*, 9 I. C. 154, 9 M. L. T. 374.

⁵ *Jageshwar v. Raj Narain*, 31 C. 195; *Uttam Chand v. Mst. Thakurdevi*, 4 Lah. L. J. 190, 3 Lah. 233, 1922 (Lah.) 39; *Ramaswamy v. Anaiya*, 165 I. C. 737, 1936 (Mad.) 545; *Girdharilal v. Rannoo*, 1944 N. L. J. (Nag.) 37.

document be set up at the trial as being an acknowledgment saving limitation,¹ but he can be granted leave to amend his plaint by stating the ground of exemption.² The Nagpur High Court refused to take notice even of an oral statement of plaintiff's pleader when the ground was not alleged in the plaint.³ He cannot be allowed to take advantage of an allegation in the defendants' written statement for claiming the benefit of S. 20, Limitation Act 1908.⁴ It has, however, been held in Oudh that it is open to the plaintiff to show in reply to the defence set up, that his claim is within time by reason of an acknowledgment of the defendant.⁵ The Bombay High Court and Oudh Chief Court have held that when a ground has been stated in the plaint, the plaintiff is not precluded from taking another, and not inconsistent, ground, if he believes that the latter is the true ground to get over the bar of limitation.⁶ In the Oudh case the new ground of exemption was furnished by an Act of the legislature. But, it is submitted, that in any case this should not be allowed without amendment of the plaint. The Madras High Court has held that in such cases unless the plaint is amended the suit must be dismissed.⁷

¹ *Marudai v. Chinnakannu*, 25 M. L. T. 295, 52 I. C. 243, (1919) M. W. N. 429, 9 L. W. 82.

² *Ram Sukh v. Guhlam Md.*, 115 P. W. R. 1918, 46 I. C. 495, 102 P. R. 1918, 120 P. L. R. 1918.

³ *Ghasiam v. Girja Shanker*, 1944 (Oudh) 247.

⁴ *Debi Ghilabhai v. Mehta*, 1935 Cal. 255, 155 I. C. 721, 39 C. W. N. 139.

⁵ *Ram Autar v. Beni Singh*, 20 O. C. 89, 68 I. C. 195, 1952 (Oudh) 135; *Contra Mahadeva v. Marudai*, 1933 (Mad.) 874, 1933 M. W. N. 931.

⁶ *Yakub v. Bai Rahmal*, 10 Bom. L. R. 345; *Percy F. Fisher v. Ardeshir*, 37 B. L. R. 165; *Rajbahadur v. Raja Ram* 1940 O. W. N. 988.

⁷ *Palni v. Savugan*, 1933 Mad. 395, 142 I. C. 192, 1933 M. W. N. 595, 64 M. L. J. 317.

CHAPTER XIV

Plaint (*concluded*)

Substantial portion

The other portion of the body of the plaint, which must be called its substantial portion, should contain a statement of all the facts constituting the cause of action,¹ with such particulars of those facts as are necessary.² And, where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds they shall be stated, as far as may be, separately and distinctly.³ Thus, in a suit on two bonds, particulars of each, with account of money due, should be separately given. The plaint shall further show, either specifically or by implication from other facts, that the defendant, is, or claims to be, interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.⁴ Where there are more defendants than one and they are not jointly interested in the claim, it should be shown what the liability of each is and why each has been impleaded in the suit. Similarly, if more plaintiffs than one bring a joint suit and their interest in the subject-matter is not joint, their causes of action should be separately shown.

“Cause of action” means every fact which it would be necessary for the plaintiff to prove in order to support his title to a decree,⁵ in other words, it is a bundle of essential facts which it is necessary for the plaintiff to prove before

¹ O. 7, R. 1 (e).

² *Vide* Chap. VI, *ante*.

³ O. 7, R. 8.

⁴ O. 7, R. 5.

⁵ *Murli v. Bholaram*, 16 A. 165.

he can succeed in the suit.¹ Cause of action is not only infringement of the right at a particular moment but it means material facts in the case of the plaintiff.² But, as has already been explained in an earlier chapter,³ these facts should be carefully distinguished from inferences of law on the one hand, and from evidence necessary to prove such essential facts on the other, and no fact which is only relevant for proving an essential fact should be alleged in the plaint. This statement of facts in the plaint should, in no way, offend against the general rules of pleading already given. What is required is a statement of the facts with particulars from which the court may infer that the plaintiff has a cause of action and not a bare statement that the plaintiff has a good cause of action.⁴ But if facts are correctly stated a wrong statement of inference from those facts would not be fatal. For example, when a plaintiff correctly stated that the property which he claimed by inheritance belonged originally to his maternal grandfather A and on his death devolved on his son B, and on the latter's death on B's mother C, but claimed as heir (daughter's son) of A instead of claiming as sister's son of B, the latter statement which was only an inference from facts correctly stated was held not to be fatal.⁵

A pleader should be very careful in stating these facts, for a plaintiff is entitled to succeed only on the cause of action alleged by him in the plaint,⁶ and if he omits any material facts, which is a part of the cause of action of his claim, his plaint is liable to be rejected under O. 7, R. 11 (a) unless he can be granted permission to amend it. Amendment, however, cannot be claimed as of right, and when it is allowed, the plaintiff is saddled with costs, which, in some cases, may be very heavy. Therefore when there is a reasonable doubt

¹ *Dhunjisha v. Forde*, 11 B. 649; *Musi v. Manilal*, 29 B. 368; *Raghunath v. Gobind Narain*, 22 C. 451.

² *Puranmal v. Onkarnath*, 1959 Pat. 128.

³ Chap. IV.

⁴ *Ram Prasad v. Hazarimull*, 58 C. 416, 1931 Cal. 458, 134 I.C. 538.

⁵ *Moti Mahton v. Debal Mahton*, 1935 Pat. 503.

⁶ *Denobundhoo v. Kristomonee*, 2 C. 152.

whether a particular fact is essential or not, it is always safer to allege it than to omit it.¹

What facts are essential to constitute the cause of action for a particular claim depends on the claim itself.

Generally speaking, the plaintiff's right or title which In suits has been infringed must be stated first, and then the fact of infringement. Thus, in a suit brought on a contract, the contract must first be alleged, and then its breach, and then the damages. The actual contract which was in force between the parties at the date of the breach should alone be alleged. If there have been, at different times, different agreements between the parties, it is unnecessary to set out the original terms which have been dispensed with but it is sufficient to state the modified contract as it stood when the cause of action accrued.² Nor need contingencies be stated, if the events upon which they were contingent never happened. If there are several covenants, some of which are broken and some not, the latter need not be stated in the plaint. The breach must be stated in the terms of the contract or words co-extensive with the effect or meaning of it, unless the words of the covenant are too general and would give no idea of the specific breach. If the contract is to do more things than one, the plaintiff must state that the defendant has done none of them, or if he has done any, it should be set out precisely. Thus, if the promise is to pay Rs. 500 on a particular day, it is not sufficient to say that Rs. 500 was not paid on that day. It should be alleged that "*Rs. 500 or any part thereof* was not paid on the date fixed or *at all*. Special damages must also be alleged with precision. When a plaintiff alleged that she had "lost several suitors" on account of a slander, it was held to be too general a statement, and names should have been given.³ But

¹ Byrd v. Nunn, 5 Ch. L. 78; Brook v. Brook, 12 P. D. 19.

² Boone v. Mitchel, 1 B. and C. 18.

³ Barnes v. Prudlir vel Bruddle, 1 Sid. 36.

sometimes, a plaintiff is allowed to allege generally a loss of business or custom and to prove it without having recourse to particular instances,¹ e.g., in a case for infringement of a patent.

In suits on
tort

In a case of tort, the right violated, when it is not one peculiar to the plaintiff, but one possessed by every citizen, need not be stated, the wrong alone need be alleged with the special damages claimed, if any. But when the plaintiff claims a special right, it must be alleged. For instance, in a suit for damages for slander, assault or malicious prosecution, the wrong alone need be stated. It is not necessary to state that the plaintiff was entitled to a right to remain immune from the attack of the defendant on his body or on his fair name. But in case of infringement of a copy right or of obstruction to an easement, the plaintiff's right should be specifically stated before alleging the act of infringement or obstruction. In case an act of tort is actionable only when done in a particular manner, e.g., maliciously, negligently or with a particular knowledge, the plaintiff should also allege that it was done in that manner.

There are certain cases in which the plaintiff's right alone constitutes the cause of action, without any infringement. For instance, in a suit for partition, all that has to be stated is the title of the plaintiff and the defendant, and neither is it necessary nor proper to show any infringement of the plaintiff's title.²

Matters of
inducement

The facts constituting the cause of action are often preceded by what are known as "matters of inducement."³ They are sometimes necessary for a clear understanding of the facts constituting the cause of action, but they should be reduced to a minimum, as, strictly speaking, they are not material facts,

¹ *Rose v. Groves*, 5 M. and Gr. 613.

² *Woodroffe and Ammer Ali*, C. P. C. 678,

³ See Chapter III.

One other precaution which every lawyer has to take in drafting a plaint is to avoid, making any frivolous and vexatious allegations, which is generally stated to be the cause of dispute. Such allegations are not required to be made by law. In fact they generally create a prejudice against the plaintiff. They are never of any help in the determination of the real controversy between the parties. On the other hand if they are allowed to stand, they may result in saddling the plaintiff with compensatory costs under Sec. 35 A CPC. In a case on the basis of an alleged contract, the court, having found the document, forming the basis of claim, a forged one, awarded to the defendant maximum compensatory costs¹

Part III—Relief

The third and the last, though not the least important, Relief part of a plaint is the relief sought by the suit. The relief sought should be accurately worded and it is risky to use loose or inartistic language as there is always a danger of the court throwing out the case,² though courts should not be too strict if it can be fairly inferred what the plaintiff really means. In a case where a plaintiff sued for a declaration as to the existence of a custom, the court gave a decree for a declaration that the villagers had a right based on custom.³ In a civil suit different kinds of reliefs can be claimed, e.g., recovery of debt, damages, or movable property; possession of, or declaration of title to, immovable property, declaration of any right, specific performance, injunction, rendition of account, appointment of a receiver, etc. A plaintiff might claim any one or more of such reliefs, either simply or in the alternative, (e.g., he may sue for pre-emption or partition)⁴ but whatever reliefs he claims must be stated

¹ Venkataswami v. Laxminarayan A. I. R. 1959 A. P. 204

² Mst. Saida Begum v. Sabir Ali, 1962 All. 9 (a case of execution).

³ Dina Nath v. Jitendar, 1930 (Cal.) 744.

⁴ Abu Isa Thakur v. Dinabandhu, 1947 Cal. 426, 151 C. W. N. 639.

in the plaint specifically,¹ as reliefs claimed in the plaint cannot be supplemented by any oral prayer. Nor can a court allow a man more than he himself claims,² but it is the duty of the court to mould the relief according to the facts proved which however should not be inconsistent with the pleading.³ For example, when a plaintiff sued for a decree for sale on a mortgage he was not allowed a personal decree merely on his oral statement before the court asking for it,⁴ and when he sued for one-fourth share of the land he cannot be allowed possession of the whole.⁵ The plaintiff omitting a relief will therefore have to make an application for amendment which cannot be allowed after limitation. Each relief should be clearly and separately stated and two or more reliefs should not be mixed together.

It is not necessary that the plaintiff should claim the relief for himself, for cases may be conceived in which plaintiff is not entitled to claim a decree in his favour. For instance, where a trustee refuses or neglects to sue in respect of a trust, the beneficiary may bring a suit impleading the trustee as a defendant and praying for decree in favour of the trustee against the principal defendant.⁶

If a plaintiff can claim more than one relief on the same cause of action, he must claim all, otherwise he shall not be entitled to bring a new suit for the omitted relief, unless the omission in the first suit was with the leave of the court.⁷ Such leave must be expressly obtained and where a relief was omitted it was held that the court's remark in the judgment that a claim for the omitted relief could be brought

¹ O. 7, R. 7.

² *Buddhu Lal v. Ram Sahai*, 138 I. C. 808, 9 O. W. N. 523, 1932 (Oudh) 244.

³ *Sundar v. Mahadco*, 1942 (Pat.) 243.

⁴ *Rawat v. Gur Prasad*, 114 I. C. 309, 1929 (Oudh) 303.

⁵ *Fazal Din v. Milkha*, 145 I. C. 182, 1933 (Lah.) 193.

⁶ *Taun Man v. Che Som*, 1932 (p. c.) 146, 151.

⁷ O. 2, R. 2; *Kishen Narain v. Nizamuddin*, 1937 O. W. N. 1146.

later on was held not to be such permission.¹ The only exception to this rule is a mortgage suit, for such a suit can be brought even after a personal decree on the same mortgage bond has been previously obtained. Such a suit will become necessary, if in execution of the decree the plaintiff wants to sell the mortgaged property which he cannot do without bringing a suit for sale.²

As has already been explained in Chapter II, damages are of two kinds, general damages and special damages. In England, the plaintiff does not claim any specific amount as general damages, but in India it is different. Here a claim has to be valued for the purpose of jurisdiction, and in every money suit, the precise amount claimed has to be stated.³ Therefore the plaintiff must claim a fixed amount as general damages. As he cannot get more than the amount claimed by him, the practice generally is to claim a larger amount than the court is expected to allow. If the case is one of breach of contract, and no damages have actually resulted from the breach, the plaintiff may still get nominal damages, and it would be unnecessary in such cases to claim a large amount.

Where damages have actually resulted from the defendant's act, whether in breach of a contract or in tort, the plaintiff should claim the exact amount of such damages. He has to give full particulars of every pie he claims. The damages should be such as have resulted directly and immediately from the defendant's act, and, as in the ordinary and natural course of things do arise from such act. The plaintiff should not therefore claim special (as opposed to general) damages, more than the actual amount of such damages, if any. He can, under certain circumstances claim even greater, i.e., extraordinary damages, if he has suffered any, in case he had given notice to the other party that a

¹ Krishen Narain v. Nizamuddin, 1937 O. W. N. 1146.

² O. 34, R. 14.

³ O. 7, R. 2.

breach of the contract would result in such damages to him.¹ It is the date of breach which has to be taken into consideration in assessing the damages and the plaintiff can therefore claim damages incurred on that date, e.g., in case of non-acceptance of goods sold the plaintiff can claim the difference of the contract and market prices on the day fixed for delivery, and the price which the goods fetched at a resale on a later date cannot be taken into account,² (unless the re-sale is made under Section 54 of Sale of Goods Act). But future damages anticipated at the date of suit to result from the breach not only may, but must, be claimed, and, if they are not claimed, a subsequent suit for them will be barred by O. 2, R. 2, C. P. C.³ If a definite sum is mentioned in the contract as being payable in case of breach the plaintiff can claim anything up to that amount without showing actual damage.⁴

Similarly in the case of tort, circumstances existing on the date of tort have to be taken into consideration, and, though the injured party must act reasonably, he is not bound to spend money for any possible advantage to the tortfeasor.⁵ As in breach of contract so in a case of tort, the plaintiff must claim all damages which have actually resulted as well as those which are bound to result in future from the tortious act, and a subsequent suit for damages incurred after the institution of a previous suit would be barred by O. 2, R. 2, C. P. C. For instance, if A is beaten by B and has to remain in hospital in consequence, and he brings a suit before he is fully cured and discharged, for expenses incurred in treatment, as damages, he cannot bring a separate suit for any future expenses incurred by him after institution of the suit. He must either wait until he is in a position to

¹ For example of such damages, *see* Precedent of "Suit for special damages for breach of contract to do work within time."

² *Firm of Ganga Ram v. Kodoo Mal*, 88 I. C. 571 (Sind.).

³ *Simpson v. Cleghorn*, 4 C. L. R. 91.

⁴ Section 74, Contract Act.

⁵ *Rogers v. John King and Co.*, 53 C. 239.

claim all the damages, or must estimate his future damages and add the same to the sum claimed as damages already incurred. But if the tort is a continuing wrong, e.g., a nuisance, and damages continued to arise from day to day so long as the tort continues, the plaintiff can claim damages arising from the tort up to the date of suit only, and a separate suit would be necessary for damages for tort continued after the suit.¹

In every suit for money, the precise amount claimed must be stated in the plaint, with a statement of any amount set off or relinquished by the plaintiff.² The plaintiff can be awarded a decree for any amount up to the amount claimed by him, but not for a higher amount except by amendment of the plaint. In a claim for money found on taking accounts, however, the plaintiff is required to state only approximately the amount claimed by him, and if a larger amount is found due, he can be awarded a decree for that, on payment of the additional court-fee.³ The same would be the case in a suit for mesne profits.⁴

The prayer should be for necessary and effectual reliefs only and no relief should be sought, which is not necessary or the grant of which will be implied in the grant of the other and main relief prayed for. For instance, a decree for possession of property in favour of the plaintiff as owner implies a judicial recognition of his right of ownership and no relief for declaration of such right need be added to the claim for possession. The popular form of relief in such cases which is common in the U. P., viz., "With the declaration of the fact that the plaintiff is owner of the land, a decree for possession be passed in his favour" should therefore be discontinued, and the following simple relief should be prayed for : "The plaintiff claims possession of

Redundant
relief

¹ Darley M. C. Co. v. Mitchell (1886) 18 App. Cas. 127; Crumble v. Wallsend L. Board, (1891) 1 A. B. 503.

² O. 7, R. 2 and O. 7, R. I (b). C. P. C.

³ O. 7, R. 2, C. P. C.

⁴ Midnapur Zamindari v. Bijoy Singh, 72 C. L. J. 14.

Similarly, if a Hindu father transfers the family property to a stranger without legal necessity, the sons can recover the property, but the relief in such cases need only be for possession of the property, and it is needless to claim a declaration that the sale by the father is null and void.

So, in a suit to recover possession of property by a reversioner from the hands of a transferee from the life-estate owner, or to recover possession of land from a lessee under a lease granted by an agent beyond his authority, all that is necessary is to state the grounds of the claim, (e.g., that the transfer was without any legal necessity, or beyond the legitimate authority of the lessor), and to claim simply a decree for possession. It is not necessary that a prayer for cancellation of the lease or transfer or for having it declared null and void should be made.¹ Whenever a plaintiff is entitled to treat as a nullity any document under which a defendant claims property to which the plaintiff is entitled, he can always disregard it, and the only case in which he is bound to pray for cancellation of it before he can be allowed to recover the property is when the document has been executed by himself.² For instance, if A sells his house to B and puts the latter in possession, he cannot recover the house on the ground that the sale-deed had been obtained from him by B by fraud, unless he also prays for cancellation of the sale-deed. In such cases, a prayer for cancellation of the sale-deed should be made separately and distinctly from that for possession.

But an alienation of the property of a minor by a person who is the minor's *de facto* but not *de jure* guardian is absolutely void, and the minor, therefore, need not pray to have it set aside. He can directly pray for possession of the

¹ Unni v. Kunchi Amma, 14 M. 26 (27); Harihar Ojha v. Dasarathi Misra, 33 C. 257 (265, 266); Bijoy Gopal v. Krishna Mahishi Debi, 4 A. L. J. 329 (331), (P. C.) 34 I. A. 87.

² Ibid; Radhika Mohan v. Hari Bashi, 146 I. C. 1010, 37 C. W. N. 1141, 57 C. L. J. 399, 1933 (Cal.) 812.

property.¹ The Allahabad High Court has held that a minor impeaching a transfer even by his *de jure* guardian need not pray for cancellation of the transfer but may sue for possession only.² Where a sale-deed was executed by the mother of a minor as his natural guardian, the minor must sue for cancellation of the deed and it is not enough to sue for possession only.³ The minor is to be deemed to be a party to the deed where the father executes it for himself and on behalf of the minor⁴.

Sometimes the addition of such redundant reliefs by unskilful or careless pleaders involves their clients in needless expense and trouble. If, for instance, the suit is brought more than three years after the transfer by the father, limitation might be pleaded to the claim for cancellation of the transfer, though it has been held that the prayer for cancellation may be regarded as redundant and the 12 years' rule of limitation applicable to a suit for possession should be applied.⁵

It has already been pointed out that it is unnecessary to anticipate the defence of a defendant and to make an attempt to give a reply to it in the plaint, much less to add a prayer for a declaration of the weakness of that claim. If a plaintiff claims a house, as owner, from A who claims under a lease or mortgage from a trespasser B, it is not necessary to pray for a declaration that B has no title to the property. Such reliefs as the following are generally found in plaints in this country :—

“With the declaration that neither has B any right to

¹ *Punjabrao v. Atmaram*, 1926 (Nag.) 124, 87 I. C. 1018; *Karunappa v. Periaswami*, 1960 Mad. 253 (but the Bombay Court held in *Tulsi Das v. Rai Singh*, 1933 Bom. 15 F. B. that such an alienation was not void. The same view was taken in *Kondamudy v. Myneni*, II F. C. R. 65, (See *Mullas Hindu Law* at. 538.)

² *Abdul Rahman v. Sukhdayal*, 2 A. L. J. 507.

³ *S. Pillai v. K. Pillai*, 1956 Mad. 670 (F. B.).

⁴ *Surajpal v. Jagannath Pd.*, 1954 A. L. J. 710.

⁵ *Unni v. Kunchi Amma*, 14M. 26 (27); *Harihar Ojha v. Dashrathi Misra*, 33 C. 257 (265, 266); *Bijoy Gopal v. Krishna*, 4 A. L. J. 329 (331) p. c.

the property, nor has A acquired any under the lease granted by B, a decree for possession be passed in favour of the plaintiff."

Another example of redundant relief is the claim for several declarations when only one is necessary and all the rest simply follow from it. For instance, a prayer in the following form "It be declared that the plaintiff is in possession of the field as proprietor, that defendant is not the owner of it and that he has no right to eject the plaintiff treating him as his tenant" should not be made. The plaintiff should claim simply a declaration of his title as owner, and the rest of the propositions would follow as a matter of legal inference from it.

Sometimes the grounds on which a relief is claimed are mixed up with the relief itself and the relief is therefore claimed in the most prolix language. For instance, in a suit for having a deed declared null and void on the ground of its having been obtained by fraud or undue influence, it is not unusual to find the relief expressed in the following term :—

"It be declared that the deed of mortgage, dated,—has been obtained by fraud and undue influence exercised by the defendant upon the plaintiff and is therefore null and void and not binding on the plaintiff and that the defendant cannot take any advantage of it, and has not obtained any right under it."

General Relief

The Code also provides that it is not necessary to ask for any general or other relief, in addition to the main relief or reliefs which the plaintiff claims. Such general or other relief can always be given, as the court may think just, to the same extent as if it has been asked for.¹ The practice of adding a relief in the following or similar form "Any other relief to which the plaintiff may be found to be entitled," or "as the nature of the case may require" should therefore

¹ O. 7, R. 7.

be discontinued. The relief in Precedent No. 43 given in Appendix A, C. P. C., is therefore redundant. But it must be remembered that the court cannot give any relief which is not founded on the allegations in the plaint¹ thus, if the plaintiff sues for declaration of title under a sale-deed, he cannot be allowed to succeed on the basis of a title by adverse possession.² Nor can any relief be given by way of general relief which would be of an entirely different description from the main relief; as prayer for other relief can only mean other relief ancillary to the main relief³ thus, in a suit by a reversioner against a Hindu widow for an injunction restraining her from committing waste and for appointment of a receiver, the plaintiff cannot, if he fails in the reliefs claimed, be given a declaration that he is the next reversionary heir.⁴ A relief based on a case inconsistent with, that on which the suit is originally based cannot be given e.g., if a suit is based on a right of easement, relief cannot be that based on ownership.⁵ Nor can a decree be passed in favour of a *pro forma* plaintiff in the event of the failure of the claim of the real plaintiff.⁶ Nor can a decree for judicial separation be passed in a suit for dissolution under Parsi Marriage and Divorce Act.⁷ In a suit under S. 13 of the Hindu Marriage Act, however, relief was granted under S. 10 of the Act.⁸ In a suit for sale of the mortgaged property, a simple money decree can be passed, if the mortgage contains a personal covenant to pay⁹; and in a suit for possession as

¹ Badar-uddin v. Herajatulla, 54 I. C. 797.

² Somasundaram v. Vedivelu 31 M. 531.

³ Abdul Rahim v. Mohammad Barkat, 55 C. 519, 1928 P. C. 167, 56 I. A. 96; Kisan Bhagwan v. Shree Maroti, 1947 Nag. 233; Bundi Singh v. Shivnandan Prasad Shaw, 1950 Pat. 89. Kedarlal v. Harilal A. I. R. 1952 S. C. 47.

⁴ Janki v. Narayansami, 43 I. C. 207, 36 M. 634.

⁵ Imam Din v. Nizam Dei, 1933 (Lah.) 267.

⁶ Debi Dayal v. Bhan Pertap, 31 C. 433.

⁷ Phiroze Bomansha v. Srimibai, 173 I. C. 395, 10 R. B. 329, 1938 (Bom.) 65, 39 Bom. L. R. 1146.

⁸ Bhagwan Singh v. Amar Kuer, 1962 Punj. 144.

⁹ Shukhdeo v. Lachhman, 24 A. 456.

mortgagee, a simple money decree can be passed if the document relied on as a mortgage is found not to operate as such.¹ In a suit on a pronote a decree on original consideration was passed in Nagpur when in the plaint all the facts showing the original consideration were stated.² In a suit for rent, a decree for damages for use and occupation can be passed.³ In a suit on contract, if the contract is found to be void a decree for money under Sec. 70, Contract Act can be passed.⁴ The Supreme Court has held that court can pass preliminary decree directing enquiry into future mesne profits under Order 20 Rule 12 C.P.C. even if no specific prayer has been made.⁵ But it is better to make a specific prayer. It has been held that plaintiff ought to be given such relief as he is entitled on the facts established upon the evidence even if there be no specific prayer.⁶ The question whether the plaint is defective and whether the defect is remediable depends on the facts and circumstances of individual cases.⁷

Court's
power to
grant different
relief*

When necessary facts are stated in a plaint which, if established, entitle the plaintiff in law to obtain certain reliefs, it is open to the court to grant him such reliefs, although the reliefs, asked for may be inartistically framed. In a case where the facts asserted by the plaintiffs (puisne mortgagees) which entitled them to the right of subrogation were not disputed, it was held that the court could grant them appropriate reliefs on the basis of subrogation, even if the plaintiffs alleged the suit to be one for contribution in

¹ *Bisram v. Bhagwant*, 1926 (Oudh) 201, 91 I. C. 6.

² *Gulabgir v. Nathmal*, 27 N. L. R. 327.

³ *Ajodhya v. Kaiwan*, 74 I. C. 582; *Sheo Karan v. Prabhu Narayan*, 6 A. L. J. 167, 31 A. 276 (F. B.); *C. N. Chandra v. Ahmad Yar*, 13 Lah. L. T. 34; *see contra* *O, Leary v. Maung on Gaing*, 4 Bur L. T. 197, 11 I. C. 863.

⁴ *State v. B. K. Mandal*, 1962 S. C. 779; *New Marine Co. v. Union of India* 1964 S. C. 152.

⁵ *Gopal Krishna Pillai v. Meenakshi Ayal* A. I. R. 1966 S. C. 155.

⁶ *L. Shivdayal Kapoor v. Union of India* A. I. R. 1963 Punj. 538.

⁷ *Mehtabchand v. Kundanmal* 1964 Raj. L. W. 242.

* *See also Chap. VIII under heading "Court not to set up new case."*

respect of the amount paid by them to discharge a prior mortgage.¹ When a relief is claimed on a specific ground, the court may grant it on a different ground, if the latter is disclosed by the allegation in the plaint and the evidence in the case.² Thus, in a suit for possession as owner, the plaintiff was given a decree for possession as a service-tenure-holder.³ In a suit for possession a decree for redemption was given.⁴ In a suit for dissolution of partnership and ascertainment of plaintiff's share, where the defendant pleaded that the partnership had been dissolved and a certain sum of money was found due to the plaintiff, it was held that the court could give a decree for that amount.⁵ In another case where a partner sued another for a definite sum said to have been allotted to him on dissolution and taking of account and it was found that account had not been settled, the court gave a decree for accounts.⁶ In a suit on the footing of a partnership, the court can pass decree on the footing of holding out under Sec. 28 of the Partnership Act.⁷ In a case in which plaintiff claimed easement by prescription, their lordships of the Privy Council decreed the claim on the presumption of title arising from a grant.⁸ Similarly, if plaintiff claims ownership he can be given an injunction on ground of easement.⁹ In a suit for prohibitory injunction based upon easementary right, the court granted a mandatory injunction observing "the court has power to mould the relief" and grant an appropriate relief. The appellate court too has power to pass any decree under

¹ Babulal *v.* Bindhachal, 1943 (Pat.) 305, 22 Pat. 187.

² Rasul Jehan *v.* Ram Saran, 11 C. 539; Haji Khan *v.* Baldeo Ram, 24 A. 90.

³ Jokhan *v.* Mahes, 27 I. C. 720, 13 A. L. J. 150.

⁴ Munga Lal *v.* Sagarmal, 1936 (Pat.) 629.

⁵ Karu Musi *v.* Jaldu (1913) M. W. N. 432, 19 I. C. 848, 24 M. L. J. 561.

⁶ Sheodat *v.* Pushi Ram, 1947 All. 229, 1947 A. L. J. 181.

⁷ Minor Periakaruppan *v.* T. S. Subharama, 1043 (Mad.) 190.

⁸ Maharani Rajroop Koer *v.* Abdul Hossein, 6 C. 394, 7 I. A. 240; Secretary of State *v.* Mathurabhai, 14 B. 213 (220).

⁹ Tamanabhat *v.* Krishta, 144 I. C. 998, 53 Bom. L. R. 144, 1933 (Bom.) 122.

Order 41 Rule 33 C. P. C. as ought to have been passed.¹ But the Calcutta High Court has held that when a plaintiff asks for a right as an easement, the court cannot give him relief on the basis of a natural right which is not claimed in the plaint.² The Allahabad H. C. has held that where plaintiff claimed title by adverse possession but could not prove adverse possession he cannot be allowed to set up the plea that he had acquired some customary right or customary easement.³ Where a suit was for present possession of a holding, a decree for declaration of title and right to take possession after a term was granted.⁴ In a case the mere fact that a plaintiff claimed a money decree and did not pray for sale of the property charged did not prevent the court from passing a decree for sale.⁵ In a converse case, however, when the plaintiff had brought a mortgage suit and the mortgage was found invalid, the Oudh Chief Court refused to grant him a simple money decree under Sec. 65, Contract Act.⁶ A plaintiff suing for possession can be granted a decree for joint possession⁷ and a plaintiff suing for ejectment in his individual capacity may, on the finding that the holding belongs to him and others, be given a decree on behalf of all the co-sharers.⁸ In a petition for dissolution of marriage where the wife failed to prove adultery but proved cruelty, the court gave a decree for judicial separation.⁹ A plaintiff suing for a larger relief should be given a decree for the smaller relief if he is found entitled to that, and his suit cannot be dismissed¹⁰ but a court

¹ Bhondoo and others *v.* Udatoo A. I. R. 1970 A 307.

² Mohendra Nath *v.* Nabin Chandra, 57 I. C. 504.

³ Mahadeo *v.* Bhagelu, 39 I. C. 596, 1 Pat. L. W. 401.

⁴ Bhagwana *v.* Ch. Gulab Kuer, 1942 (All.) 221.

⁵ Naresh *v.* Bidya, 95 I. C. 1004.

⁶ Rajamohan *v.* Manzoor, 1937 (Oudh) 410, 169 I. C. 785; Kalka Singh *v.* Badri Singh, 1947 Oudh 33.

⁷ Sheikh Surat *v.* Mahomed Yunus, 73 C. L. J. 42.

⁸ Budha Singh *v.* Sant Singh, 95 I. C. 121.

⁹ Browne *v.* Browne, A. N., 165 I. C. 12, 1936 O. W. N. 918.

¹⁰ Pitambar *v.* Ram Joy, 7 W. R. 93; Lakshman *v.* Hari, 4 B. 584; Venkataramana *v.* Varahalu, 1939 (M. W. N.) 1028, 50 L. W. 681.

cannot give to a plaintiff more than what he asks for.¹ In a suit for a share of profits in a *theka* the Court finding that plaintiff was not entitled to a decree for profits but to a decree for maintenance gave him that decree.² But where plaintiffs sued for a declaration that they were sole owners of a certain *shamilat* land and it was found that this was not correct as defendant had also some share in it and the suit was therefore dismissed, the Lahore High Court refused to determine the defendant's share and grant a decree to the plaintiffs for declaration of their remaining share, as the determination could not be made without further enquiry.³ In another case, where plaintiff sued for ejectment of the defendant and a declaration that the entry of defendant being his tenant was wrong, the court was held not entitled to grant a decree that the defendant was a tenant.⁴

In a suit for rent when the plaintiff failed to prove the contract he was not granted a decree for compensation for use and occupation.⁵ Where one of the co-sharers of joint land sued the other who was in sole possession for mesne profits and the suit was dismissed as no ouster having been proved it was held that the defendant was not in wrongful possession, the appellate court refused to give a decree for plaintiff's share of profits on the ground that different considerations would arise if the suit were to be regarded as one for profits.⁶ Claims for partition and maintenance have been held to be different and it has been held that they should be separately pleaded, and a decree for maintenance cannot be passed when a suit for partition fails.⁷

In all such cases in which a court is called upon to give a relief different from that claimed by the plaintiff, the test

¹ *Mt. Parbati v. Ram Sahai*, 138 I. C. 808, 9 O. W. N. 523, 1932 (Oudh) 294.

² *Narayanaprasad v. Lakshman Prasad*, 1945 (Nag.) 229.

³ *Udham Singh v. Ram Singh*, 1937 (Lah.) 428.

⁴ *Chitan v. Gosain* 162 I. C. 183, 1936 (Pat.) 230.

⁵ *Kripa Shanker v. Janki Prasad*, 196 I. C. 950 (Pat.)

⁶ *Debiprasad v. Sarabjit*, 1947 Oudh 129.

⁷ *Chiman Das v. Kundanmal*, 1943 (Sindh) 100.

is to see whether the defendant is not taken by surprise, and there can be no surprise if the relief granted is consistent with that claimed and with the case raised by the pleading,¹ or is less than that claimed by the plaintiff. The Patana High Court has held that plaintiff need do no more than suggest the relief to which he is entitled, and it is for the court to determine what relief should be given on the facts found,² but O. 7, R. 1, (g) requires the relief to be stated. Where all facts were stated in the plaint and the plaintiff claimed only one relief although he could have claimed another alternative relief, it was held that the court could grant the latter relief.³

The court should always be ready to do all it can to do justice and should give the right relief to which a plaintiff is entitled, as far as it is possible. In a case where a plaint was badly drafted and the relief sought was not clearly brought out, but evidence was laid on right issues and no party was prejudiced, the Lahore High Court gave the plaintiff the proper relief.⁴ But the fact that the court can give the right relief should be no excuse for a pleader for not being careful in claiming the right relief, for the mistake may at least deprive his client of the costs of the suit. It is his duty to claim the relief to which his client is entitled on the facts, and if he is entitled to several reliefs in the alternative, he can claim those reliefs alternatively. In a suit based on a pronote an appropriate alternative relief which could be claimed on the facts alleged was not claimed, but the plaintiff was given a decree on the basis of defendant admission.⁵

Costs

A court is bound to pass an order about the costs of a suit, and as it cannot deprive a successful plaintiff of

¹ *Hemendra v. Upendra*, 34 C. 433, 22 C. L. J. 419, 32 I. C. 437, 20 C. W. N. 446; *Abdul Khaleque v. Bepin Behari*, 1936 (Cal.) 465.

² *Bulaki Das v. Ganpat Rao*, 1946 (Nag.) 112.

³ *Naga v. Kini*, 1933 Pat. 695.

⁴ *Fazal Ilahi v. Guddar Shah*, 169 I. C. 929, 1937 (Lah.) 1.

⁵ *Indermal Tekaji Mahajan v. Ram Prasad Gopilal A. I. R. 1970 M. P. 40* relying upon the case of *firm Shrinivas Ram Kumar v. Mahabir Prasad A. I. R. 1951 S. C. 177*.

his costs, except for special reasons to be recorded,¹ it is unnecessary to claim costs as a definite reliefs.

In all money suits, the plaintiff should claim interest from the date of the institution of the suit to that of payment. Although there is nothing in the Code to require a plaintiff to claim it or to prevent a court from awarding such interest if it is not claimed,² still it is always better to claim it. Sec. 34, C. P. C. gives discretion to the court to allow it on the principal sum at such rate not exceeding 6 p. c. p. a.³ as it considers proper. It is, therefore, not necessary to specify the rate at which such interest is claimed, and it is sufficient to claim it "at such rate as the court deems proper." There is, however, no objection if the plaintiff claims it at a particular rate, e.g., at 6 per cent per annum. In any case, no additional court-fee is payable on this portion of the plaint. If such interest is not claimed or allowed, no separate suit for it will lie.⁴

Future
interest

Similarly, a claim for mesne profits from the date of suit may also be added to one for possession or past mesne profits or for both. Though it has generally been held that neither the plaintiff's omission⁵ to claim future mesne profits nor the court's omission⁶ to grant it when claimed can be a bar to a subsequent separate suit for them, yet a contrary view has been expressed in Bombay⁷ and in a case in Allahabad.⁸ The Allahabad High Court has taken this view very reluctantly and some of the previous cases of that court do not appear to have been brought to its notice.

Future
mesne
profits

¹ Sec. 35 (2), C. P. C.

² *Yadaorao v. Ram Rao*, 1940 (Nag.) 240.

³ Act 66 of 1956.

⁴ Sec. 34 (2).

⁵ *Ram Janam Singh v. Kemblal*, 1925 (Pat.) 145.

⁶ *Muhammad Ishaq v. Muhammad Rustam*, 40 A. 292, 44 I. C. 16 A. L. J. 182; *Doraisami v. Subramania*, 42 I. C. 929, 41 M. 188, 33 M. L. A. J. 699; *Bipul Behai v. Nikhi Chandra*, 124 I. C. 65, 33 C. W. N. 943, 1929 (Cal.) 566; *Beelam Konda v. Jethi*, 1945 (Mad.) 222.

⁷ *Atma Ram v. Paras Ram*, 44 B. 954, 58 I. C. 419.

⁸ *Goswami Gordhan Lalji v. Bishambarnath*, 49 A. 597, 25 A. L. J. 409, 1927 (All.) 716, 109 I. C. 736.

The Madras High Court has held that even when the plaintiff does not claim future mesne profits the court can award them.¹ This view of the Madras High Court is no more good law as the Supreme Court in a recent case has taken a contrary view. The plaintiff brought a suit for possession of immoveable property on the basis of title. No mesne profits were claimed in the plaint. The Supreme Court refused to award mesne profits and observed that the "Remedy is to take separate steps according to law".² though in an earlier case of *Gopal Krishna Pillai A. I. R. 1966 S.c 155*, the S.c ordered an enquiry into future mesne profits under O₂₀ R₁₂ C. P. C. In view of this divergence of judicial opinion, it is always better for the plaintiff to claim future mesne profits also in every suit for possession. But if the suit is one under Sec. 9, Specific Relief Act 1877 (S. 6, of Act of 1961), no mesne profits can be claimed, and a separate suit for them is maintainable.³

¹ *Kemgam v. Vaddadi*, 124 I. C. 290, 57 M. L. J. 800, 1930 (Mad.) 160.

² *Sidramappa v. Rajashetty A. I. R. 1970 S. C. 1059*.

³ *Sheo Kumar v. Narain Das*, 24 A. 501, 22 A. W. N. 139.

Written Statement

CHAPTER XV

Defence

After laying certain substantial requirements of plff's pleading in the form of plaint in O. VII. the code makes provisions for deft's pleading, known as written statement in O. VIII. Unlike the plaint it is not incumbent for the deft. to file defence in writing. He has been given an option either to contest the plff's claim by filing a written reply or to appear personally and state his defence orally. In the latter case it becomes the duty of the court, after hearing the narration by the deft. to put all the important facts to the deft. and obtain his reply and record the whole thing. Thereafter, it is for the court, to frame proper issues, containing the points in dispute, throwing the burden of proof correctly and to direct the parties to adduce evidence on the date fixed in proof thereof. For that purpose a reasonable opportunity has to be given to the parties, keeping in mind the principles of natural justice, for every party has a right to defend himself and to be heard. No court can refuse that right and nor can a person be deprived of that right.¹

The defendant's written defence or pleading is called a "written Statement" in India. It is not absolutely necessary for a defendant who wants to contest a suit to file a written statement, as omission to do so does not amount to admission of the claim,² though as a matter of practice he usually does, except in petty money suits in some of the Small Cause Courts, or where there is no serious defence. He is however, entitled to file it if he likes on, or before, the first hearing of the suit, or within such further time as the court

Filing
written
statement

¹ Sangram Singh v. Election Tribunal A. I. R. 1955 S. C. 455 Also see Barret v. African Products A. I. R. 1928 P. C. 261.

² Rani Sonabati v. Raja Kirtyanand, 14 Pat. 74.

Consequence of not filing when ordered by court

may grant him. The court may also call upon him, either by an order passed at the time he appears to contest the suit, or at any subsequent stage, to file a written statement of his defence within a time to be fixed by the court. He is then bound to file such a written statement.¹ If he fails to do so, the court may pronounce judgment against him or may make such order in relation to the suit as it deems fit, under Order 8, Rule 10, C. P. C. Formerly a controversy existed whether the provisions of Order 8, Rule 10 applied only to a case where subsequent pleadings were called for under Order 8, Rule 9 or also to a case where written statement was called for under Order 8, Rule 1. The Madras High Court held (Seshagiri Aiyer, J. dissenting) that Order 8, Rule 10 applied to both classes of cases.² In a later case the same High Court approved of the dissenting judgment of Justice Seshagiri Aiyer.³ The Rangoon High Court also held that Order 8, Rule 10 did not apply to disobedience of an order under Rule 1.⁴ This controversy has been set at rest by the Supreme Court which has held that Order 8, Rule 10 applies to cases falling under Order 8, Rule 1 also.⁵ The Court cannot, in any case, order the trial to proceed *ex parte*,⁶ as that can be ordered only when the defendant does not appear, and not when the defendant appears but disobeys an order of the Court. The judgment which the court will pass under this rule shall comply with all the requirements of a judgment by stating the facts and the grounds of the order. A mere order decreeing the suit is not such a judgment.

Requirement of a written statement

When the defendant appears and neither himself files a written defence nor is ordered by the court to do so, the court should examine him with a view to find out his defence, and then proceed to try the case. But when he files a written

¹ Order 8, Rule 1.

² *Ranga Sami v. Manickam*, 40 I. C. 223, 1917 M. W. N. 291; *contra* 2 O. W. N. 391.

³ *Nagaratnam v. Kamalathammal*, 1945 Mad. 299.

⁴ *A. K. Moopan v. Karupana*, 6 R. 466.

⁵ *Sangram Singh v. Election Tribunal*, 1955 S. C. 425.

⁶ *Ranga Sami v. Manickram*, 40 I. C. 223, 1917 M. W. N. 291.

pleading by way of defence, his pleading should conform to all the general rules of Pleading laid down in preceding chapters. The object of the present chapter is to discuss only the particular and special requirements of such a pleading, apart from the general requirement already mentioned. A subsequent pleading filed by the plaintiff, either in reply to a defendant's claim of set off, or, with leave of the court, in answer to defendant's pleas in defence, is also called a "Written Statement.". All the rules relating to defendant's written statement apply, *mutatis mutandis* to such written statement of the plaintiff also.

Before proceeding to draft a written statement, it is always necessary for a pleader to examine the plaint very carefully and to see whether all the particulars are given in it and whether the whole information that he requires for fully understanding the claim and drawing up the defence is available. If any particulars are wanting, he should apply for them before filing a written statement. If he cannot make a proper defence without seeing any documents referred to in the plaint, and the defendant has not with him copies of them, or copies do not serve the required purpose, he should call upon the plaintiff to grant him inspection of them and to permit him to take copies, if necessary, or, if he thinks necessary, he may apply for discovery of documents. If he thinks any allegations in the plaint are embarrassing or scandalous, he should apply to have them struck out, so that he may not be required to plead to them. After all these preliminaries have been settled, and he has obtained full instructions from his client, he must make up his mind as to the line of defence he intends to take. If there are several defendants they may file a joint defence, if they have the same defence to the claim. If their defences are different, they should file separate written statements, and if the defences are not only different but also conflicting, it is not proper for the same pleader to file the different written statements. For instance, if two defendants, executors of a bond, are sued on the bond, and their plea is one of

Considerations before drafting a written statement

satisfaction, they can file a joint written statement. If the plaintiff claims limitation from the date of a certain acknowledgment made by one defendant and contends that the acknowledgment saves limitation against the other also, the defendants may file separate written statements. In a suit on a mortgage-deed executed by Hindu father, to which the sons are also made parties on the ground that the mortgage was for a legal necessity, if the sons want to deny the alleged legal necessity they should not only file a separate defence from their father's but should also better engage a separate pleader.

A—Formal portion of written statement

A written statement should be drafted with the same care, or perhaps with more care, than the plaint. It should have the same heading and title as the plaint, except that, if there are several plaintiffs or several defendants, the name of one only may be written with the addition of "and another" or "and others," as the case may be. The number of the suit should also be mentioned after the name of the court. After the names of the parties and before the actual statement, there should be added some words to indicate whose statement it is, e.g., "written statement on behalf of all the defendants" or "written statement on behalf of defendant No. 1," or "written statement on behalf of the plaintiff in reply to defendant's claim for a set off" or "written statement on behalf of the plaintiff filed under the order of the court, dated....." or "written statement on behalf of the plaintiff, filed with the leave of the Court." In some places, the words "The defendant states....." or "The defendant states as follows :—" are used before the various paragraphs of the written statement but this is not necessary. The rules about signature and verification of pleadings should be carefully observed.

No relief should be claimed in the written statement, and even statements such as that the claim is liable to be dismissed should not be inserted. But when a set off is pleaded and the defendant prefers a counter-claim for any

excess amount due to him, a prayer for judgment for that amount in defendant's favour should be made.

The rest of the written statement should be confined to the defence.

B—Body
of the
written
statement
Forms of
defence

A defence may take the form of a "*traverse*," as where a defendant totally and categorically denies the plaintiff allegation, or that of "*a confession and avoidance*" or "*special defence*," where he admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own, as where he admits the bond in suit but pleads that it has been paid up, or that the claim is barred by limitation, or that of "*an objection in point of law*" (which was formerly called in England "*a demurrer*"), e.g., the plaintiff allegations do not disclose a cause of action, or that the special damages claimed are too remote. Another plea may sometimes be taken which merely delays the trial of a suit on merits, e.g., a plea that the hearing should be postponed under Section 10, C. P. C., or that the suit has not been properly framed, there being some defect in the joinder of parties or causes of action and the case cannot be decided until those defects are removed. These pleas are called "*dilatory pleas*" in contradistinction to the other pleas which go to the root of the case and which are therefore known as "*Peremptory pleas*" or "*pleas in bar*." In England, dilatory pleas are not permitted in pleadings, but must be taken by separate proceedings which are special to the procedure of that country. In India, they may either be taken in the written statement, or by a separate application filed at the earliest opportunity, as some pleas, such as that of misjoinder and non-joinder, cannot be permitted unless taken at the earliest opportunity.¹

A defendant may adopt one or more of the above forms of defence, and in fact he can take any number of different defences to the same action. For example, in a suit on a bond he can deny its execution, he can plead that the claim

¹ Order 1, Rule 13; Order 1, Rule 7.

is barred by limitation, he can plead that, as no consideration of the bond is mentioned in the plaint, the plaint does not disclose any cause of action, he can plead that the bond being stated to be in favour of two persons the plaintiff alone cannot maintain the suit. He can as well plead one form of defence to one part of the claim, and another defence to another part of it.

He can take such different defences either conjointly or alternatively, even if such defences are inconsistent. But certain inconsistent pleas such as those which depend for their proof, on entirely contradictory facts are sometimes not allowed. The question how far inconsistent pleadings, are allowed has already been discussed in Chapter VII.

Any ground of defence which has arisen to the defendant even after the institution of the suit, but before the filing of his written statement, may be raised.¹ In case of defendant's death, his legal representative cannot raise a defence which defendant could not himself have taken.²

All possible defences must be taken and if the defendant does not take any plea, he may not be allowed to advance it at a later stage, particularly when it involves a question of fact.³

How to
draft a
written
statement

When the defendant relies on several distinct grounds of defence or set off, founded upon separate and distinct facts, they should be stated in separate paragraphs⁴ and when a ground is applicable, not to the whole claim but only to a part of it, its statement should be prefaced by words showing distinctly that it is pleaded only to that part of the claim, thus : "As to the mesne profits claimed by the plaintiff, the defendant contends that, etc." or "As to the price of cloth said to have been purchased by the defendant, the defendant contends that etc."

¹ O. 8, R. 8.

² *Sadho Singh v. Firm Kalin Singh*, 1944 (Lah.) 473.

³ *Bhabani v. Sarojini*, 1944 (Cal.) 106.

⁴ O. 8, R. 7.

When it is intended to take several defences in the same written statement, the different kinds of defences should be separately written. It is convenient to adopt the following order for the several pleas :—

I—Denials.

II—Dilatory pleas.

III—Objections in point of law.

IV—Special defences (pleas in confession and avoidance)

V—Set off.

All admissions and denials of facts alleged in the plaint should be recorded in the first part of the written statement and before any other pleas are written. If a defendant wishes to add an affirmative statement of his own version to the denial of a plaint allegation, or to add anything in order to explain his admission or denial, it is better and more convenient to allege the additional facts along with the admissions or denial, than to reserve them until after the admissions or denials have been recorded. For example, if a defendant wants not only to deny that the plaintiff's father died in 1922, but also to assert that he died in 1912, as he means to base a plea of limitation on that ground, he should plead that "the defendant denies the allegation in para. 2 of the plaint that the plaintiff's father, AB, died in 1922, and alleges that the said AB died in 1912".

There is a common but fallacious belief that bare denials are not really any defence to the claim in themselves but have to be recorded only as preliminary statements before the real defence is set out, and therefore even when a simple denial or a traverse would be sufficient to constitute the defence, the practice is to add in another paragraph the same defence in a different and stronger language. For instance, if the defence to a bond suit is that the defendant never borrowed any money from the plaintiff and never executed the bond in suit, the defendant at first denies the plaint allegation of these facts, along with the admissions and denials of other allegations of the plaint, and then in his so called "additional

pleas" takes a separate defence in the following form : "The defendant never borrowed any money from the plaintiff and never executed any bond. The bond is a forgery, and the plaintiff is not entitled to a decree". This is bad and unnecessary pleading. It is sufficient simply to plead that "the defendant denies that he borrowed any money from the plaintiff or that he executed the bond." The system, prevailing in some States of recording admissions and denials separately from the additional pleas is unnecessarily cumbersome and involves repetition.

Of the special defences, those alleging justification or excuse, such as fraud, minority, privilege, etc., should be placed before those alleging a satisfaction or discharge, but ordinary defences, such as limitation are generally inserted before more complicated ones, such as fraud, undue influence, etc.

If there are some defences which are applicable to the whole case and others which apply only to a part of the claim, the former should always be pleaded before the latter.

In what form each of the different kinds of defences should be stated will now be discussed separately.

I.—Admissions and Denials

Should always be recorded

The written statement should begin with the admission and denial of the material facts alleged in the plaint. Each fact should be taken up in the same order in which it is alleged in the plaint, and it should either be admitted or denied, or when the defendant has no knowledge of it (e.g., when he was no party to the alleged transaction); he may simply refuse to admit it. It would not be sufficient to plead a general denial of the grounds alleged in the plaint (O. 8, R. 3). Though this rule refers to denials it covers non-admission also,¹ and therefore non-admissions should also be specific and not general. (For distinction between denial and non-admission, *see* below).

¹ *Thorp v. Holdsworth*, (1876) 3 Ch. D. 637, 640.

Though the Code does not require admissions to be recorded in the same way as denials, and though omission to deny or to refuse to admit is always construed as an admission,¹ yet it is always better and more proper to record admissions of facts in the same way as denials are recorded, and it is always better and safer for everybody to insist on a defendant saying something to every fact alleged in the plaint. That something should be either an admission or a denial, or (where the defendant was no party to the transaction and has no knowledge of facts), a refusal to admit. The practice of stating "not known" or "the defendant has no knowledge of the facts alleged in para.—of the plaint" is wrong, and this cannot be held to mean denial or non-admission because a party might admit even a fact of which he has no knowledge.² The Supreme Court has recently held that to say that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact not even an implied denial. It would therefore be taken to be admitted in terms of Order 8 Rule 5 C. P. C.³ Therefore if defendant does not admit a fact he should say so expressly. Want of knowledge may be his reason for non-admission but such reasons are not relevant and need not be stated. In such cases the defendant should say that he *does not admit* such and such facts.

Nothing, however, should be denied which is not expressly alleged in the plaint, even if the defendant thinks it might be in the plaintiff's mind or that the plaintiff really meant to allege it. If a suit is brought on a bond executed in lieu of an earlier bond, it is absurd to allege in defence that the defendant did not receive a single pie as consideration for the bond in suit, as the plaintiff does not say that the defendant received cash consideration.

Ordinarily a party should frankly admit a fact in his

¹ O. 8, R. 5.

² *Laxmi v. Ramlal*, 1931 All. 423, 131 I. C. 414.

³ *Jahuri Sah v. Dwarika Pd. Jhunjhunwala* A. I. R. 1967 S. C. 109.

opponent's pleading which is known to him to be true and which he also knows would be proved without difficulty. It is not a fair attitude to commence by denying everything. In addition to the bad impression such an attitude creates on the mind of the judge, a party unnecessarily denying a fact may, if the judge so orders have to pay the costs of proving it. But sometimes a pleader, even in England, refuses to admit a fact or a document, to compel his opponent to call a particular witness whom he wants to cross-examine in order to prove facts which are essential to his case, and which no other witness could prove. But such considerations of policy should seldom arise.

The words "not admitted" and "denied" are not synonymous and should not be indiscriminately used. Where a fact is such that it must be within the defendant's knowledge it must be admitted or denied and it is not sufficient to say that the defendant does not admit it. For example, if the plaintiff alleges that the defendant beat him, the defendant should not say that the allegation is not admitted, he should deny it. But when the defendant has no knowledge or at least the fact is such that the defendant cannot be supposed to have a personal knowledge of it he can refuse to admit it and in that case it would be proper to say that the fact is "not admitted."

Where the fact is within the knowledge of the defendant or is such that it should be within his knowledge the mere words "Not admitted" are not enough to cast the burden of proof on the plaintiff. Such a fact should be specifically dealt with otherwise it may not be taken to be specifically denied.¹

Excep-
tions

The general rule that every allegation in the plaint should be specifically admitted or denied is subject to two well recognized exceptions :

(1) Mat-
ters of Law

(1) *Matters of law, or inferences from law*, if pleaded in the

¹ Sheikh Abdul Sattar v. Union of India A. I. R. 1970 S. C. 479.

plaint need not be traversed, because Order 8, Rule 3 applies to fact only. But if such allegation of law is not admitted, the defendant may take an objection in point of law. For instance, if a plaintiff alleges that he is related to A in a particular way and that therefore he is the legal heir of A, the defendant may simply deny that the plaintiff is related to A as alleged, but he need not say that he does not admit or that he denies that the plaintiff is the legal heir of A. If he means to contest that, even if the plaintiff is related to A as alleged, still he would not be his legal heir, he should do so by separate plea (as an objection in point of law).

(2) *Damages*: The defendant need not plead to the claim or amount of damages alleged in the plaint,¹ whether the damages claimed are general or special. He may however, plead that the damages claimed are too remote, or not sufficient to give a cause of action to the plaintiff. (2) Damages

Besides these two exceptions, it is not necessary to deny the relief sought, as is usually done in the following form, "The relief sought is not admitted." Nothing need be said about the paragraphs containing the formal allegations of facts showing that the court has jurisdiction and the allegations about valuation of the suit, unless the defendant intends to question these matters and the facts alleged by the plaintiff. In such cases the defendant should definitely state that he does not admit the facts, adding his own version, thus—"The defendant denies that the property is worth Rs. 800, and submits that it is worth Rs. 2,100 and the suit is not cognizable by this court."

The following two rules must be remembered when traversing the opponent's allegations :—

- (1) That the denials must be specific; and
- (2) That the denials must not be evasive.

(1) *Denials must be specific* : Every allegation, the truth of which is desired to be denied, should be taken up separately. Denial to be specific

¹ O. 8, R. 3.

tely and categorically denied in the written statement. It is not ordinarily proper to state that the defendant does not admit a particular paragraph of the plaint, or that a particular paragraph or a particular allegation is not admitted "as alleged," or "in the way it is mentioned", or that it is "admitted subject to the other pleas of the defendant", or "a portion of paragraph 4 is admitted and the rest is not." The denial should be bold and clear and there should be no half-hearted denial, nor is any apology needed as a preface to the denial, such as "The defendant does not admit the fact *because (he has no knowledge of it)*" or, *the defendant is a stranger to the family* or is a resident of another village), hence he does not admit, etc." The proper mode of denial is to single out the particular fact which a defendant wants to deny and to deny it, referring to it, as far as possible, in the words of the plaint itself. For example, "the defendant denies the allegation that he was the agent of the plaintiff," or "The defendant admits that he made to the plaintiff the representation set out in paragraph 3 of the plaint, but denies that he did so falsely or fraudulently or with any intention to mislead the plaintiff." The practice which obtains at some places of singling out allegations which are admitted, and adding that the rest are denied, is not strictly accurate. For example, it is not correct to plead that "in para. 2 of the plaint, it is admitted that the plaintiff's father died in 1912, the rest of the allegations are denied." The allegations which are denied should be specified. In a case the plea that "the facts that the defendant has not specifically admitted should be treated as denied" was not considered sufficient as denial of any fact.¹ In the case of facts which are not the essentials of the cause of action but which are alleged only as matters of inducement or introduction or as explanations of the essential facts, denial may be made with reference to paragraphs, e.g. "the defendant denies the allegations contained in paras. 2, 3 and 4 of the plaint." But this form of denial must be

¹ Richutranand v. Mir Mahabub Ali, 1947 Pat. 275.

avoided in case of essential facts, except when the allegations are lengthy and the defendant means to deny them wholesale. Even in such a case it will not be proper simply to say that para. so and so of the plaint is not admitted. It would be more specific to say that "the defendant denies each and every one of the allegations made in para. so and so" or "the defendant does not admit any one of the several allegations in para. so and so." The Allahabad High Court, however, regarded in one case the words "not admitted" used in respect of a paragraph in which a mortgage had been set out in all its details as a sufficient denial of the mortgage bond.¹ In another case, the same court took a more strict view. The case is an interesting one as showing the consequences of loose pleadings. The plaintiff gave a cheque to the defendant to be handed over to his brother, but the defendant himself cashed it and appropriated the money. The plaintiff alleged that he did not obtain definite knowledge of the appropriation until a date within 3 years of the suit, on which the defendant had an interview with him and told him that he had cashed the cheque and refused to pay. The defendant admitted the interview but as to what happened at that interview he did not deny the plaintiff's version but simply stated that it was "not admitted" and in further pleas said nothing about the interview but simply pleaded that the suit was barred by time. An issue of limitation was framed by the court which threw the burden of proving his first knowledge within 3 years of the suit on the plaintiff. The High Court held that it was manifest that the defendant's pleadings were evasive and that he did not properly raise the issue as to the date of plaintiff's knowledge, and that therefore the plaintiff was not bound to prove that he first came to have knowledge of the mis-appropriation within 3 years, though he was bound to show this if the defendant had definitely denied the plaintiff's version of what happened at the interview.² The case, however, appears to have been

¹ Balaghat Husain *v.* Abid Baksh, 95 I. C. 1 (All.).

² Sri Kishan *v.* Ghananand, (1929) A. L. J. 1153.

decided on its own particular facts and the decision was not based on O. 8., R. 5, C. P. C. In another case in which the plaintiff had alleged service of notice on the defendant, that the defendant, did not vacate the house and several other facts in one paragraph, the same H. C. held that defendant's denial of this paragraph was not specific denial of each fact and the allegation of service of notice must be deemed to have been admitted.¹ If allegations are admitted in their entirety, they need not be repeated but may be admitted with reference to paragraphs, e.g., "The defendant admits the allegations in paras. 3 and 4 of the plaint."

Where a joint written statement is filed on behalf of several defendants, a denial on behalf of all of them should be in the following form—"Each of the defendants denies execution of the bond," or the defendants deny that they, *or either of them*, executed the bond." The plea that "the defendants deny that they executed the bond" or that "the defendants did not execute the bond" is not specific, as it would be consistent with one of the defendants having executed the bond.

In a suit for money due on account, the plaint contained an allegation that certain sums passed on certain dates were paid towards interest and the defendant alleged that the statement of account set out by the plaintiff was untrue and that the application of S. 20, Limitation Act, 1908, was untrue. It was held that this only meant that defendant denied the alleged payments and that even if the facts alleged were found to be true the suggested application thereto of S. 20 was incorrect, but the allegation could not be held to be a specific denial of the fact that the payments, if proved, were made towards interest.² Where the plaintiff alleged that he was adopted son and had attained majority on a particular date and therefore the suit was within time and the defendant pleaded that "It is denied that the plaintiff is the adopted son

¹ *Ganga Prasad v. Prem Kumar*, 1949 All. 173, 1948 O. W. N. 279.

² *Shyamlal v. Mirtunjay*, 1947 Pat. 446.

and para. 1 of the plaint is denied," it was held that there was no specific denial of the allegation that plaintiff attained majority on the particular date alleged by him in para. 1.¹

When a compound allegation, consisting of several distinct facts, is made in the plaint, and it is intended to deny each of such facts, a single denial of the whole allegation will not be specific, but the defendant should break up the allegation into separate parts, denying each of them separately. For instance, if the plaintiff alleges that "the defendant took possession of the plaintiff's house," and the defendant means to deny both the allegations of having taken possession of the house as well as of the house being the plaintiff's house, he must do so by saying that :—

Denial of compound allegation

"1. The defendant never took possession of the house.

2. The house is not the plaintiff's house."

A single traverse in the following form would not be specific :—

"The defendant denies that he took possession of the plaintiff's house," for it will be taken to mean that the defendant only denies having taken possession of the house. Similarly, if the plaintiff alleges that "AB executed the said deed on behalf of the defendant, as his agent, acting under a power of attorney duly signed by the defendant," the defendant must not plead a single denial of the whole allegation. If he wishes to traverse the whole allegation, he must plead that—

"1. The said AB never executed the said deed.

2. The said AB never executed the said deed on behalf of the defendant or as his agent.

3. The defendant never signed any such power of attorney, nor did AB ever act under it."

So, if the defendant simply says that he never enticed

¹ Rishab Kumar v. Singai Motilal Kastur Chand, 1949 Nag. 21.

away the plaintiff's wife, this will be taken to mean a denial of the act of enticing away and not of the fact that the woman was the plaintiff's wife.

It may be right for the plaintiff to allege two or three facts in one para. and join them by "and," but if the defendant wants to deny each of them it will be evasive to say that he denies that para. He should either break up the sentences into separate sentences each containing one allegation and deny that allegation or should use the word "or" instead of "and" when denying the whole compound allegation. For instance, if plaintiff says that "defendant paid Rs. 10 towards interest and endoresed the payment on the bond" and defendant intends to deny both, he should say that "defendant did not pay Rs. 10," & "defendant did not endorse any payment on the bond," or may say, "defendant denies that he paid Rs. 10, *or* that he endorsed any payment on the bond."¹

Conse-
quence of
a denial
not specific

If the defendant does not choose unequivocal language for denying a fact which he intends to deny, and does not make it clearly appear from his written statement that he does not admit it, he runs the risk of being taken to have admitted it, for there is a rule that "every allegation of fact in the plaint, if not denied specifically, or by necessary implication, or stated to be not admitted in the pleading of the defendant shall be taken to be admitted."² The punctuation of this rule in the C. P. C. is defective and would seem to imply that a fact stated to be not admitted will be taken to have been admitted. The rule should be so read as if there were no comma after "implication," or as if before the word "stated" the words "if not" were inserted.³ By "necessary implication" is meant that the denial of one fact follows necessarily and unmistakably from the express denial of another fact. For instance, if a defendant denies that he was

¹ Seth Gobind Ram *v.* Gulab Rao, 4 D. L. R. (Nag.) 94.

² O. 8, R. 5.

³ Mansa *v.* Ancho, 1933 A. L. J. 998, 145 I. C. 802, 1933 (All.) 521.

ever a tenant of the plaintiff, the allegation that the plaintiff let the house to the defendant is denied by necessary implication. If there is no denial or a definite refusal to admit a fact, the fact stands admitted, although the defendant never intended to admit it. In a case in which the defence was, "the defendant puts the plaintiff to proof of the several allegations in his statement of claim" (plaint), it was held that all the plaintiff's allegations stood admitted,¹ although most probably the defendant intended to deny each of them. Similarly, if the defendant says in respect of any allegation that "he has no knowledge" or writes "not known," the allegation will be deemed to have been admitted.² The same will be the result if he simply says that "the allegation needs no reply."³ In a case of libel, the defendant stated in the first paragraph of the written statement that he "does not admit all or any of the allegations in the plaint except such as have been expressly admitted," and then he traversed all allegations specifically but not that of publication. It was held, that there being no specific denial of publication, the same should be deemed to have been admitted in spite of the statement in the first paragraph.⁴ Where, in a suit for dissolution of partnership and accounts, the plaint stated the proportion of shares, and defendants, while alleging that the shares were different did not specify what the shares were, it was held that the court could treat the evasive denial as an admission of the correctness of the statements in the plaint.

This rule of constructive admission does not, however, apply to a person under disability, as minor or a person of unsound mind. No inference from a mere omission to deny can therefore be raised against such a person. This

¹ *Haris v. Gamble*, 7 Ch. D. 877, 47 L. J. Ch. 344.

² *P. L. N. K. L. Chettyar Firm v. Ko Lu*, 152 I. C. 395, 1934 Rang. 278. Also see *A. I. R.* 1967 S. C. 109.

³ *U. Lun v. U. Chit*, 1941 (Nag.) 49, 193 I. C. 114.

⁴ *L. A. Subramania v. R. H. Hitchcock*, 85 I. C. 900 (Madras).

⁵ *Choitram v. Khem Chand*, 113 I. C. 370, 1929 (Sindh) 7.

rule being one of pleading only, the constructive admission is only for the purpose of the particular suit and cannot be used against defendant as an admission in a subsequent litigation.¹

It has been held in a Sindh case that the rule of constructive admission would apply only when the allegations in the plaint are clear and not when they themselves are vague and inconclusive.²

The rigour of the rule has been further modified in India by providing that "the court may in its discretion require any fact so admitted to be proved otherwise than by such admission."³ This proviso is borrowed from a similar provision in Sec. 53 of the Evidence Act. The court may always call for proof of any fact which is not expressly admitted and may refuse to draw the inference of admission from the mere omission to deny. But the court should always give due notice of this to the plaintiff either by striking an issue on the point, or by passing an express order that the plaintiff will be required to prove such facts, otherwise the plaintiff will be entitled to rely on the constructive admission and will not be ready with proof of the fact. This discretion should be exercised by the court in a case in which it suspects that the admission is made collusively or to avoid a rule of public policy⁴ etc., as in a proceeding for divorce. The Patna High Court has held that this proviso should not be used to support a plea of limitation.⁵ The Supreme Court held that the proviso should be invoked only in exceptional cases in pleading on the original side of Bombay High Court which should be construed strictly.⁶

Ex parte
cases

There is a considerable conflict of judicial opinion on the question whether the omission to file a written statement

¹ *Mt. Diali v. Lachman Singh*, 1946 (Lah.) 256.

² *Haji Shakoor v. Volkart Bros.*, 1937 (Sind) 11, 168 I. C. 330.

³ Proviso to O. 8, R. 5.

⁴ *Venkata v. Muthu*, 60 I. C. 554, (1920) M. W. N. 512, 28 M. L. J. 43.

⁵ *Bichitranand Sahu v. Mir Mahebub Ali*, 1947 Pat. 275.

⁶ *Badat and Co. East India Trading Co.* A. I. R. 1964 S. C. 538.

should be regarded as admission of the claim by implication under O. 8, R. 5. The Calcutta¹ and Patana² High Courts Sind Chief Court³ and Madhya Pradesh High Court⁴ have held that it should not, as this rule is merely one of construction of pleadings, when one is filed, and is no authority for dispensing with evidence in an *ex parte* case when the defendant does not file any pleading. The Lahore⁵ and Bombay⁶ High Courts have held that if a defendant does not file a written statement the plaint allegations stand admitted and no evidence is therefore necessary in an *ex parte* case, though under the proviso to this rule the court may insist on the plaintiff producing evidence and refuse to grant him a decree merely on this constructive admission.

(2) *Denials must not be evasive* : When a defendant denies an allegation of fact in a plaint, he must not do so evasively, but answer the point of substance.⁷ By “point of substance” is meant the real gist and significance of the allegation traversed, as distinguished from comparatively immaterial details. Though, ordinarily, a traverse is usually framed in terms of the allegations, yet sometimes it may become ambiguous if it follows those terms too closely. For instance, if it is alleged that a defendant received a certain sum of money, it should not be sufficient to deny that he received that sum, but he must deny that he received that sum or any part thereof, or else set out how much he received. In a case in which it was alleged that the defendant had not handed over to the plaintiff certain rents which he had received from the plaintiff’s tenants, the defence was that “the defendant had handed over to the plaintiff all the rents which he had

Denials
not to be
evasive

¹ Ross and Co. v. Scriven, 43 C. 1001.

² Ramaracha v. Sultanunnissa, 108 I. C. 895 (Patna); Rameshwar v. Harakh, 1941 (Pat.) 226; Bhageran Rai v. Bhagwan Singh 1962 Pat. 319.

³ Musammat Hala v. Lokumal 1944 (Sind) 61.

⁴ Tehsil Cooperative v. Union of India A. I. R. 1968 M. P. 165.

⁵ Kulwant v. Dhanraj, 158 I. C. 113, 16 Lah. 768, 1935 (Lah.) 396.

⁶ Shriram v. Shriram, 164 I. C. 189 (8), 1936 (Bom.) 285. Also see Bhujang Rao v. Baliram 108 I. C. 879 (Nag.).

⁷ O. 8, R. 4.

received from the plaintiff's tenants." This was a bad traverse, as it does not appear whether the defendant had received all the rent due or part of it. He must state, if he received any, and if so, how much rent, and what amount he handed over to the plaintiff.¹

If a plaint contains the allegation that the defendant did a certain act in a certain manner, e.g., that he wrongfully entered certain premises, a literal traverse of this allegation such as, "the defendant never wrongfully entered the premises" would be ambiguous, for it would not be clear whether the defendant intends to deny the entry or to assert a right to act as he did. Similarly, if the allegation is that the defendant offered, on June 24, 1925, Rs. 500 as bribe to the plaintiff's agent, it will be evasive for the defendant to plead that "he denies that, on June 24, 1925 he offered Rs. 500 as bribe to the plaintiff's agent," as this would be consistent with his having offered the bribe on any other date, or a bribe of a different amount. The proper traverse would be, "The defendant denies that he offered, on June 24, 1925, or on any other date, Rs. 500 or any other sum, as a bribe to the plaintiff's agent."

Such an ambiguous and defective denial is, in England, called a "negative pregnant" which is defined by Odgers as "such a form of negative expression as may imply, or carry with it, an affirmative proposition."

It should be noted that "If an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances,² as the circumstances are not often material, but are alleged by the plaintiff as particulars, and what is really required is a denial or admission of the main allegation. Thus, if a plaintiff alleges "that he advanced a loan of Rs. 1,000 to the defendant at Saharanpur, on May 15, 1925, in the presence of his uncle Khuda Baksh," it would not be sufficient to plead that "the defendant denies

¹ *Kennet v. Mundy*, Judge in Chambers (not reported.)

² O. 8, R. 4.

that the plaintiff advanced a loan of Rs. 1,000 to the defendant at Saharanpur on May 15, 1925, in the presence of his uncle Khuda Baksh." The main allegation is that the defendant borrowed a sum of money from the plaintiff and if the defendant wants to deny it, he should allege, "the defendant denies that he borrowed Rs. 1,000 or any other sum from the plaintiff." The pleas framed in such words as "the defendant never agreed as alleged" are also evasive. The defect should be removed by adding "or at all" in such cases, just as, in cases relating to definite sums of money, the words, "or any other sum" are often added to make the denial more specific and clear.

II—Dilatory Pleas

Such pleas must be taken at the earliest possible opportunity, and should have the attention of the court before any pleas on the merits. Such matters should generally be decided by the court before proceeding any further; for instance, the plea that the defendant is a minor and cannot be sued without the appointment of a guardian, or that the plaintiff is a minor and must sue through a next friend, or that a certain person is also a necessary party to the suit, or that the suit is bad for misjoinder of causes of action, or that the court-fee paid by the plaintiff is not sufficient.¹ It would be convenient to decide these questions and to remove the defects, if any, before proceeding with the trial of the case on merits. These pleas should be raised in a specific and definite form and should not be vague and indefinite. Dilatory
pleas

For instance, a plea "that the suit is bad for non-joinder of parties" will not be accepted. The defendant must allege who is the person who should have been added as a plaintiff or as a defendant.² Similarly, the plea that "the suit is

¹ In U. P. this is required by S. 6 (4) of the Court Fees Act, as amended in U. P.

² *Narain Pandey v. Suraj Bhan Lal*, 169 I. C. 897, 1937 (Pat.) 414; *Megavernam v. Mohammad*, 1936 (Mad.) 782.

barred by Section 10, C. P. C.” will not be accepted without particulars of the previously instituted suit which is said to bar the hearing of the present suit. This may be pleaded in the following way :—

“The defendant has, on October 14, 1958, previous to the institution of this suit, filed a suit against the plaintiff in the Court of the Civil Judge at Kanpur (being Suit No. 194 of 1948) for rendition of account, and the particular transaction which is the subject of claim in this suit is part of that account and is therefore directly in issue in that case. As that suit is still pending, this court cannot proceed with the trial of this suit.”

III—Objection in point of law

Objection in point of law

Such an objection should raise a point of substance, and not a merely technical objection to some defect of form.

The defendant either admits the facts or takes them as proved for the sake of argument, and bases these objections on that supposition. In substance, he means to say that even if the allegations of fact be supposed to be correct, still the legal inference which the plaintiff claims to draw in his favour from those facts is not permissible. If the plaintiff's case depends merely on the correctness or otherwise of the facts alleged by him, and he must succeed if he can prove those facts, that is no case for an objection in point of law, but it is a clear case for a traverse, or if proof of some additional affirmative facts can destroy the effect of the plaintiff's facts, that is a case for a special defence. For instance, if a plaintiff claims some property as the sister of the deceased, the defendant may deny the fact that the plaintiff is the sister of the deceased; he may as well contend that, under the personal law to which the parties are subject, a sister does not succeed to her brother. The former will be a traverse and the latter will be pleaded separately as an objection in point of law, as it can destroy the plaintiff's case without inquiry into her allegation of fact. But if the defendant does not

deny the right of a sister to succeed to her brother, his only plea will be a bare denial of the fact that the plaintiff is the sister of the deceased. In such a case, it is unnecessary to add to the denial, "and therefore she is not entitled to succeed" for that cannot be an independent plea. It is a common practice in mofassil courts to add such seemingly legal pleas to the plea of traverse, which is the only substantial plea in the case. For example, in case the right of a plaintiff is denied on the facts on which he claims it, it is not unusual to find a plea in one of the following forms also added : "The plaintiff has no cause of action," (this is found in almost every written statement in Bengal), "the plaintiff has no right of suit," "the plaintiff is not legally entitled to the property." On inquiry it is found that the plea is set up only as a legal inference from other pleas of facts. Such pleas are not only unnecessary and redundant as they do not, by themselves, destroy the case of the plaintiff, but are neither allegations of fact nor objections in point of law. They should therefore never be raised.

An objection in point of law should be framed in definite language, thus—

"The defendant objects that the special damage stated is not sufficient in point of law to sustain this suit," or "that the damages claimed by the plaintiff are too remote," or "that the plaint discloses no cause of action for this claim.

Ordinarily these objections are heard and decided at the time of trial, but if the case or any part of it can be disposed of on the decision of any such objection, the court should try that objection before proceeding to the trial of other issues, or even before the settlement of such issues.¹

IV—Special defence

A special defence, as its more suggestive and appropriate name "plea of confession and avoidance" shows, differs

Special
defence

¹ O. 8, R. 2.

Statutory
route

entirely from a mere traverse. It is one thing for a defendant to deny a contract, and quite another to admit the contract and to allege that he was induced to enter into it by fraud, or that it has been subsequently rescinded. While a traverse merely contradicts, and compels the plaintiff to prove the fact, a special defence justifies or excuses, and the burden of proving facts on which such special defence is based lies on the defendant. Therefore the rule is that all matters justifying or excusing the act complained of must be specifically and separately pleaded. The rule is thus enacted in the Code of Civil Procedure,¹ "The defendant must raise by his pleadings all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence, as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as for instance, fraud, limitation, release, payment, performance, or facts showing illegality." This rule provides the guidelines for drafting a written statement over and above the traverse. It makes obligatory for the defendant to incorporate in the written statement :—

- (a) all matters which show the suit not to be maintainable.
- (b) all matters which show the transaction relied upon by the plaintiff is either void or voidable in law; and
- (c) all other grounds of defence, not arising out of the allegations in the plaint, but are facts upon which the defendant wishes to rely, such as fraud, misrepresentation, limitation, illegality, etc. as mentioned in the rule.

The purpose is two fold. The first is that the defendant must make out his line of defence so that the plaintiff is not taken by surprise. The second is that the principle of natural justice is not violated and the plaintiff gets an opportunity to meet the pleas raised by the defendant. If this is not done at

¹ O. 8, R. 2.

the time of filing the defence, which is the proper stage, the defendant will not be permitted to take such a plea at a later stage unless amendment is allowed during trial. In one case when issues were framed in the trial court the counsel for the parties stated that no other point of dispute was left out and if there was any other point in the pleadings it was given up. In appeal the S. C. did not allow a new point to be raised in appeal.¹ In another case, an objection which should have been taken at an earlier stage, was not allowed to be taken at a later stage.² In a suit for rent the defendant did not plead that he was not in possession of a part of premises and the rent should be proportionately reduced. The trial court gave decree for the contractual rent. In appeal the court did not allow him to raise this defence, and the defendant had to suffer because of the bad pleading.³

It must further be observed that a mere averment of facts cannot give success to a party. The alleged facts have to be proved. According to law, facts and proof are correlated and there should be no variance between them. For a simple reason that no party should be prejudiced by being taken by surprise, i.e. by requiring to meet a new case. Moreover a court will refuse to base its decision on any ground outside the pleadings.⁴

In a suit by a firm if the defendant wants to plead its non-maintainability on the ground of the firm's non-registration, he should state specifically that the firm is not registered and it will not be sufficient to say that the plaintiff does not allege that the firm is registered.⁵

If any, such plea is not taken in the written statement, the defendant will not be allowed to urge it at the trial, unless

¹ *Wali Singh v. Sahan Singh* A. I. R. 1954 S. C. 263. *Gosvami Sri Mahalaxmi Upuaji v. Shab Ramchooldas Kalidas* A. I. R. 1970 S. C. 2025.

² *Shanti Pd. v. Kalinga Tubes* A. I. R. 1962 ORISSA 202.

³ *Surendra Nath v. Stephen Court Ltd.* A. I. R. 1960 Cal. 346.

⁴ *Trojan Co. Ltd. v. Nagappa* A. I. R. 1953 S. C. 235.

⁵ *Md. Ibrahim & Sons v. Behari Lal Beni Prasad*, 1938 (Lah.) 96, 39 P. I. R. 777, 175 I. C. 16, 10 R. L. 669.

he can be allowed to file an additional written statement. For instance, a plea of the illegality of consideration will not be heard for the first time at time of arguments.¹ Even a plea of limitation cannot be taken for the first time in appeal.² But if a suit is, on the statements in the plaint itself, barred by limitation and no new fact is necessary to substantiate the plea, it can, it is submitted, be raised even at a later stage of the case, as O. 8, R. 2, requires only such grounds of defence to be specifically mentioned in the written statement as would "*raise issues of fact not arising out of the plaint.*"³ Similarly, if a plea does not take the opposite party by surprise, it may be taken at a later stage; so a plea of adverse possession was allowed in appeal when there were sufficient materials on the record and the parties understood and fought out the case as if it involved an issue of adverse possession.⁴

Com-
pound
pleas

A defendant can take both the pleas of traverse and of confession and avoidance to the same claim, and it is not necessary that he should admit a fact before he can be allowed to raise an affirmative plea exempting himself from liability. He can always say, "I do not admit the contract, but even, if it is proved, the claim is not maintainable because it is barred by limitation, or the contract is legally void and not enforceable." But when a defendant really means to take both the pleas, he should be careful enough not to mix them up. He should be careful not to plead merely a traverse where he ought to plead a special defence, for, if he simply denies that he entered into a contract, he will not be allowed to show that the contract was void in law, e.g., that it was

¹ Nur Ilahi v. Mewaz Khan, 86 I. C. 683, 26 Punj. L. R. 76.

² Babulal v. Jalakia, 14 A. L. J. 1146, 37 I. C. 343; Seikh Haji Sadat Ali Khan v. Janji, 69 I. C. 194 (Cal.); Secretary of State v. Anand Mohan, 66 I. C. 287, 34 C. L. J. 205; Bhushan v. Narendra, 60 I. C. 280 32 C. L. J. 236.

³ Panchanan v. Apurva, 63 I. C. 785 (Cal.); Bhushan v. Narendra, 60 I. C. 280, 32 C. L. J. 236.

⁴ Bata Krista v. Shebaita of Thakur Jogendra Nath, 53 I. C. 639. (Cal).

a wager or that it amounted to stifling prosecution.¹ Rule 8 of O. 6 lays down that, where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged, or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract. But still in some cases the court will itself take notice of the illegality of a contract if the same appears on the face of the contract or from the evidence brought before the court,² e.g., the court can take notice of the illegality of the sale of an occupancy holding even if the defendant does not raise the plea.³ The same rule will apply to cases of tort also. If a plaintiff pleads that the defendant assaulted him, and the defendant denies this allegation, he cannot prove that he acted in self-defence. In a case of libel, mere denial of the publication will not imply a justification. But in a suit for restitution of conjugal rights, denial of marriage was held to cover a plea that if a marriage ceremony was performed, it was gone through without the defendant's free consent.⁴

Similarly a defendant should not confess and avoid, when a mere traverse is sufficient. For, he will thus introduce new matters which he may have to prove, instead of putting the plaintiff to proof of his allegations.

It is not always wise for a defendant to set up an affirmative case, particularly when the case alleged by the plaintiff is very difficult of proof and the probability is that he will not be able to substantiate it. Take an example : In a suit for damage to the plaintiff's house by fire said to have been started by the defendant, the plaintiff has to prove by

Setting up
affirmative
case

¹ Nur Ilahi *v.* Mawaz Khan, 7 Lah. L. J. 86, 1925 (Lah.) 345, 89 I. C. 683.

² Ram Jawai *v.* Gopal Chand, 64 I. C. 150, (Following 60 I. C. 734).

³ Mahadev *v.* Mahadavji, 12 I. C. 956 (Bom.).

⁴ Soctt *v.* Brown, Doering McNab & Co., 2 Q. B. 724; N. W. Salt Co. *v.* Electrolytic Alkali Co., (1914) A. C., 461; Alice Nary Hill *v.* Clarke, 27 A. 266.

satisfactory evidence that the defendant started the fire. It is therefore, wiser merely to deny the allegation against the defendant and to leave the plaintiff to discharge the heavy burden which lies upon him than to set up an affirmative case that in fact X had started the fire, and thus to make the defendant also share the burden of 'proof to a certain degree. For, if the defendant fails to prove that X started the fire, the court will be more easily inclined to believe even the somewhat less strong evidence of the plaintiff against the defendant. Similary, in a suit for possession based on title, a plaintiff cannot succeed unless he proves his title and it is unnecessary for the defendant to plead his own title or even to set up defects in the plaintiff's title. It is sufficient to deny the plaintiff's title and when plaintiff attempts to prove his title he can under his plea of denial avail himself of all defects that are disclosed in plaintiff's title.¹ It is, on the other hand sometimes most desirable to add one's version after denying the plaintiff's version, in order to show clearly what the real point in dispute is. If, for instance, a plaintiff sets out certain clauses in a document as supporting his claim, the defendant might point out other clauses which favour his defence. In each case, a discretion, should be exercised by the pleader in this respect. It is ordinarily unnecessary to plead an affirmative case, unless there is a hope of the case being improved thereby. When, however, an affirmative case is pleaded it should be done clearly and specifically, with such particulars as may be necessary, and should not be indirectly alleged nor should it be left to be inferred from some vague allegations. For example, if in a title suit for possession, the defendant wants to plead title in himself in addition to the denial of plaintiff's title he should definitely assert that he is the owner of the land, giving such particulars of his title as may be necessary. It is not sufficient to allege, as is sometimes done, that "the defendant has been in proprietary and adverse possession for over 12 years."

¹ Jagdish Narain *v.* Nawab Said Ahmad Khan, 1946 (P. C.) 59; Ram Pheran *v.* Shri Ram, 1947 Oudh 174.

Unfortunately there is a tendency in Mofassil courts for pleaders to raise too many pleas, some of which are overlapping, while others are frivolous. The necessity of being concise in pleading and of avoiding repetition has already been pointed out. One plea and one only should be raised in each paragraph of the written statement and there should be no reference to it in any succeeding paragraph, unless absolutely necessary for any special purpose. Some pleaders are also fond of raising as many legal pleas as possible, though many of such pleas are never pressed at the trial and are forgotten after the written statement has been filed and issues framed. Frivolous and untenable pleas should never be raised. They always lower the pleader in the estimation of the judge, and, if the judge is strict, he might deprive his client of the costs or saddle him with Compensatory costs under Sec. 35- A. C. P. C. irrespective of the decision on other issues and may be irrespective of the result of the suit. The only thing required is that the court must give a finding on the false and frivolous nature of the defence, or the claim.¹ The old idea of framing a defence so widely as to leave sufficient scope for arguing the case from any standpoint at the trial should be abandoned. The law requires that you must make up your mind in the beginning what line you want to adopt and what pleas you want to urge, and must so frame your written statement as to give notice of this to your opponent.

Frivolous
Pleas

A word might now be separately said about the different special defences which are commonly made.

Limitation :—The plea of limitation is a complete defence to a claim and should always be raised prominently in the written statement. It will be in very rare cases that such a plea, if not taken in the defence, will be allowed to be raised in argument, or in appeal. O. 8, R. 2, C. P. C., which requires the plea to be taken in the written statement, is a

Limitation

¹ V. Guarnam v. Veerangn A. I. R. 1943 M. 286.

new provision in the Code of 1908; therefore the former rulings which permitted the raising of such pleas even in appeal cannot all be accepted as authorities now. If, however, the plea is such that it can be substantiated without any evidence and is apparent on the face of the plaint itself, it may be allowed to be taken at a later stage of the suit.

If the plea of limitation relates not to the whole case but only to a portion of it, that portion should be clearly indicated in the pleading thus : "The claim for mesne profits for the year 1916 is barred, etc." or, "so much of the claim as relates to moveable property is barred, etc." In such cases the plea should not be raised in the general form that "the suit is barred by, etc.," or in the indefinite form that "at least a portion of the claim is barred, etc."

A plea of limitation should be raised in the following form : "The suit is barred by article—, or article—, of the second schedule to the Limitation Act, 1908."¹ When the defendant is in doubt as to the exact article applicable, there is no harm in pleading more than one article in the alternative. Even if no particular article is mentioned, the plea of limitation cannot necessarily be said to be indefinite.² But it is always proper to specify the article which is relied upon. In case limitation is pleaded under some special Act, the Act and the Section should invariably be quoted.

In some cases, some facts will also have to be briefly stated to explain the plea of limitation. For instance, "the plaintiff has never been in possession of the house at any time within 12 years before the suit, and suit is, therefore, barred by Art. 142 of Limitation Act, 1908," or "the defendant has been in adverse possession of the property for over 12 years before the suit, and the suit is therefore barred by Art. 144 of Limitation Act, 1908" or "the defendant had denied the plaintiff's title so far back as in 1912, hence the suit for declaration is barred by Art. 120 of Limitation Act, 1908".

¹ Appendix A, Sch. 1, C. F. C. General Defences.

² *Jnanendra v. Umesh*, 26 C. W. N. 584, A. I. R. 1922 (Cal.) 533.

In such cases, the bare plea of limitation without specification of such facts would be indefinite.

When the Limitation Act of 1908 was enforced a mistake was often committed in pleading limitation to a suit for possession and adverse possession was pleaded where Art. 142 of Limitation Act, 1908, should have been pleaded, and *vice versa*. The distinction between Arts. 142 of Limitation Act, 1908, and 144 of Limitation Act, 1908, was not carefully understood, and it was not correctly determined before drafting the plea which article was applicable. Art. 142 applied only to one case, viz., where the plaintiff alleged his previous possession and subsequent discontinuance of possession, or dispossession by the defendant, and the general idea countenanced by some old rulings that a plaintiff in every suit for possession had to show a subsisting title by proving possession within 12 years was fallacious. The burden of proof of possession within 12 years certainly lay on him when his suit was under Art. 142 but not at all when it was under Art. 144.¹

The Limitation Act of 1963 has considerably simplified the matter. Suits for possession have broadly speaking been divided in two classes. Art. 64 applies to suits which are not based on title but are based on previous possession and when the plaintiff while in possession had been dispossessed. The 12 years period of limitation in this class of cases will start from the date of dispossession. The other class of suits provided for in Art. 65, consists of suits for possession of immoveable property or any interest therein where the claim is based on title. For this class of suits also the period of limitation is 12 years but starts from the date when the possession of the defendant becomes adverse to the plaintiff. The Explanation to Art. 65 includes within its purview suits which were formerly covered by Arts. 125, 127, 138, 140 and 141 of the Limitation Act of 1908. In view of this change in the law, before deciding whether

¹ Bindhyachal v. Ramgharib, 1934 All. 993 (F. B.).

to plead limitation in a suit for possession and fixing the Article to be pleaded if the plea is to be taken up at all, it must first be seen whether the plaintiff has based his claim on title or not. If the answer is in the affirmative, Art. 65 will get attracted. If the answer is in the negative and the suit is based not on title but prior possession and dispossession, Art. 64 will apply.

It may be emphasised that under Rule 2 the defendant has to state all the facts necessary for his proper defence in his written statement including the plea of limitation. Because if the suit is so framed as to show that the claim is within time, it is for the defendant to show by facts stated and prove by evidence that the suit is beyond limitation and the plaintiff is not entitled to any relief. If such facts are not pleaded, the plea of limitation will not be allowed to be raised in arguments in the trial court or in appeal.¹

Jurisdiction

Jurisdiction : This is, strictly speaking, a dilatory plea, because if the objection succeeds, the defendant does not win the case on the merits, but the plaint is returned to the plaintiff for presentation to the proper court. In some cases, however this plea results in the dismissal of the suit, e.g., when the suit should have been filed in some special court under a Special Act, but has been filed in the Civil Court after the short period prescribed for it, it would be useless to return the plaint or when on the facts alleged the court in which the suit is filed has jurisdiction but the allegations are found to be wrong and the court has really no jurisdiction.²

The plea of jurisdiction should be raised in the written statement, and in case it involves an objection to territorial³ or pecuniary⁴ jurisdiction of the court, it shall not be heard in appeal or revision unless it has been taken in the trial court

¹ Manmohan Das v. Bahauddin A. I. R. 1957 All. 575.

² Hiralal v. Piarey Lal, 1933 All. 745; Sitala Din v. Mohan, 1937 Oudh 183.

³ Sec. 21, C. P. C.; see also, Hiralal Patni v. Kalinath Roy, 1962 S. C. 199.

⁴ Sec. 11, Suits Valuation Act, 1887.

at, or before, the settlement of issues. But if it is once taken, the fact that it was not repeated in the first appellate court does not debar the defendant from pressing the plea again in second appeal.¹ Other kinds of objections, e.g., one to the jurisdiction of a Civil Court, can of course be entertained at any stage of the suit, provided they are patent on the face of the proceeding.² In a Patna case it has been held that a court will not refuse to hear a plea of jurisdiction merely on the ground of its being raised at a late stage but the fact may be taken into consideration in awarding cost.³

Facts on which the objection to jurisdiction is based should invariably be set forth in the plea, e.g., "The defendant denies that he resides within the jurisdiction of this court, hence this court has no jurisdiction to try the suit," or "The contract was not made at Bareilly, but at Bombay hence this court has no jurisdiction, etc." or "The suit is one cognizable by Small Cause Court, hence, etc.," or "The valuation of the subject-matter of the suit is above Rs. 2,000, therefore, etc."

The plea in the general and vague form that "This court has no jurisdiction to try the suit" cannot be permitted, as it conveys no definite idea about the exact nature of the objection.

Accord and satisfaction : If something is given or done by the defendant to, or for, the plaintiff, which the latter accepts upon a mutual agreement that it shall be a discharge of a certain claim, the plea is called the plea of "accord and satisfaction". The agreement is the "accord" and the thing given or done in performance of it is the "satisfaction".

¹ Firm of Rai Bahadur Bansi Lal v. Ghulam Mahbub, 1925 (P. C.) 290.

² Nidhi Lal v. Mazhar Husain, 7 A. 230; Sidheshwar v. Harihar, 12 B. 155; Sayad v. Nana, 13 B. 424; Velayudam v. Arunachala, 13 M. 273.

³ Girja Kuer v. Shiva Prasad, 1930 (Pat.) 160, 16 P. L. T. 103.

Mere accord is no defence and should not be pleaded.¹ e.g., an agreement to give a mortgage for a simple bond debt is only an accord and is no defence to a suit on the bond, but if the agreement is performed, e.g., the mortgage-deed is executed by the defendant in favour of the plaintiff, it is a "satisfaction" and is a good defence to a suit on the original bond.

Accord and satisfaction may be by giving and accepting a bond or a pronote or by doing work or by delivering any cattle or thing in lieu of the plaintiff's claim or by payment of a portion of debt and remission of the rest. 'Accord' or an agreement to accept may be incapable of proof under Sec. 92, Evidence Act, but if satisfaction has been made under the agreement it can be proved and the provisions of Sec. 92,² will not provide a bar as they will not be attracted.

Satisfaction by actual payment of a debt is only a branch of accord and satisfaction, though the plea is known by the distinct name of the "plea of payment."

Payment

Payment : The mode and the time of the alleged payments must be specified in the plea. It is unnecessary to allege those payments for which the plaintiff has himself given credit. Under Sec. 91, Contract Act, even a payment made by a third person may be pleaded as a defence to the suit of the promisee, but payment to a third person is no defence unless that person had, or had been held out to the debtor by the creditor as having, the authority of the creditor to receive the payment. In the latter case, the authority, or facts implying it should be pleaded.³

A payment may be pleaded in the following form :—

"The defendant pleads a payment of Rs. 400 to the plaintiff, on June 21, 1924, towards the bond in suit" (it is

¹ Lachman Das *v.* Ram Nath, 44 A. 258, 64 I. C. 990, 20 A. L. J. 65, 1922 (All.) 13; Karam Chand *v.* Dunlop Rubber Co. 103 I. C. 86, (Lah).

² Collector of Etah *v.* Kishori Lal 1930 A. L. J. 1193.

³ Mohomed Khaleel *v.* Les Tanneries Lyonnaises, 1926 (P. C.) 34, 49 M. 435, 1926 (M. W. N.) 485.

unnecessary to add, as is often done, that the plaintiff has dishonestly failed to credit the same in his claim), or "In addition to the payments credited by the plaintiff in the account appended to the plaint, the defendant has made several payments, of a total amount of Rs. 600, particulars of which are given below.

1. Paid in cash on June 2, 1920—Rs. 150.

2. Paid by price of a bullock purchased by the plaintiff from defendant on August 3, 1920—Rs. 200.

3. Paid in cash on Decemeber 12, 1920—Rs. 250."

"The defendant paid the rent for the year 1924, on June 4, 1925, to Innayat Ali, a *karinda* of the plaintiff who has been held out by the plaintiff, as having the authority of the plaintiff to collect rent from the tenants."

Sometimes when payment is not made in cash, the plea is so badly drafted that it approaches a plea of set off which cannot be tried without payment of an *ad valorem* court-fee. For instance, a defendant sells a bullock for Rs. 200 to the Plaintiff on the agreement that the price would be credited towards a bond held by the plaintiff. When the plaintiff brings a suit on the bond without giving credit for this sum, the defendant pleads : "The defendant sold a bullock for Rs. 200 to the plaintiff but the latter has not given credit for the price in this suit" or "The defendant is entitled to a deduction of Rs. 200 on account of the price of a bullock which the plaintiff had purchased from him." The chief element which would make this a plea of payment is omitted, viz., the agreement of the plaintiff to credit the price towards his bond debt. The plea should be framed thus—

"On February 20, 1921, the plaintiff purchased a bullock from the defendant for Rs. 200 and agreed to credit the price towards the debt due to him under the bond in suit. The defendant therefore claims credit for the amount and consequent proportionate reduction in the interest claimed by the plaintiff," or more shortly, thus—

“The defendant pleads payment of Rs. 200 towards the bond in suit by the price of a bullock purchased by plaintiff from him on February 20, 1921, which the plaintiff agreed to credit towards the bond.”

A plea of payment is not the same as a plea of set off. Because payment is always made in whatever, manner before the date of filing written statement and as soon as it is made, the debt is charged to that extent. While in a case of set off the defendant's dues remain outstanding and they have yet to be adjusted by the order of the Court. In short, payment refers to part or full satisfaction of the plaintiff's debt, by act of the parties, but for the plea of set-off, the court has to adjudicate the matter and pass orders for part or full satisfaction of the debt.

Estoppel

Estoppel : This is also one of the most favourite pleas of defendants, but one which really arises only in ten per cent of the cases in which it is pleaded. Any and every act or omission or mere silence of the plaintiff is pleaded as an estoppel against him. “The defendant has been in possession for a long time without the plaintiff's interference and the plaintiff is now estopped from ejecting the defendant.” “The defendant was recorded as a tenant in the settlement records 8 years ago and the plaintiff never stirred to have the entry corrected, he is therefore, estopped from ejecting the defendant now as a trespasser,” etc., are pleas too often found in written statements. The requirements of the law of estoppel must be carefully studied, and unless a pleader is prepared to set up each element of estoppel, he should not think of pleading estoppel as a defence. If he wants to rely on estoppel he must set up such plea specifically by making the necessary averments.¹ The particular act, omission, conduct or deed which is alleged to constitute an estoppel, and the change which it has caused in the defendant's position, should be clearly specified in a plea of estoppel.² Unless the estoppel operates against the

¹ *Manikya v. Lakshmi*, 63 M. L. J. 319, 139 I. C. 465.

² *Kanhailal v. Bhaiyalal*, 16 N. L. J. 248.

whole suit, the defendant must also specify the allegations which the plaintiff is estopped from making. Such pleas as "The suit is barred by Sec. 115, Evidence Act." or "the plaintiff is barred by the principle of estoppel from preferring this claim, or from denying the defendant's title" should never be set up. The following is a correct specimen of a plea of estoppel—

"The plaintiff is estopped from denying the defendant's title to the house because, on August 20, 1922, he negotiated the sale of it by one Abdulla to the defendant and thus made the defendant believe that it belonged to the said Abdulla, and upon that faith the defendant purchased it from the said Abdulla on payment of a price of Rs. 1,000."

Res judicata : The plea of *res judicata* also should be specifically pleaded and will not be heard unless it has been pleaded. If not raised it will be deemed to have been waived.¹ It is not enough to say that the suit is barred by *res judicata* or by Sec. 11, C. P. C. Particulars should be specified, thus, "The plaintiff's claim is barred by the decree in Suit No. 194 of 1958 between the present plaintiff and Munna Lal, the father of the present defendant, from whom the defendant claims to have inherited the house in dispute, passed on May 20, 1929 by the Civil Judge at Meerut" or "the plaintiff had brought a suit for the same relief as is claimed in the present case against Munna Lal deceased, the father of the defendant, through whom the defendant claims the house in dispute. The suit (being No. 194 of 1958) was decided against the plaintiff on May 20, 1959 by the Civil Judge at Meerut this suit is, therefore, barred by Section 11, C. P. C." In a case where copies of the judgment or pleadings of the previous suit had not been filed, the High Court ruled that it should have been stated what the issues were, what was the decision on them and how the decision operated as *res judicata*.²

¹ Sansar Chand v. Dinanath, 155 I. C. 571 (All.).

² Kailashnath v. Chandrabhan, 1935 A. W. R. 500, 156 I. C. 970.

Acquies-
cence

Acquiescence : This is a good defence, specially in a suit for some equitable relief, e.g., a mandatory injunction. Mere silence of the plaintiff, however, does not amount to acquiescence. Acquiescence which will deprive a party of his legal rights must amount to a fraud and the following are the elements necessary to constitute such frauds : (1) defendant or the party pleading acquiescence must have made a mistake as to his legal rights, i.e., must have acted in a *bona fide*, but mistaken belief of his right; (2) he must have spent money or must have done some act on the faith of such belief; (3) the plaintiff or the party possessing the legal right must know of the existence of his own legal right which is inconsistent with the right claimed by the defendant; (4) he must also know of the defendant's mistaken belief of his right; and (5) the plaintiff must have encouraged the defendant in his expenditure of money or in the other act which he has done, either directly or by abstaining from asserting his legal right.¹ If any one of these elements is absent, the plea of acquiescence or equitable estoppel cannot prevail. The defendant should plead full facts establishing all the elements constituting "acquiescence." It is not sufficient to plead that.

"The plaintiff's claim is barred by the principle of acquiescence," or

"The plaintiff acquiesced in the defendant's act and cannot therefore sue now."

The proper plea would be somewhat as follows :—

"The defendant built the house at considerable expense in the presence of the plaintiff, on vacant land, in the honest

¹ Willmott v. Barber, (1880) 15 Ch. Div. 96; Jai Narayan v. Jafar, 24 A. L. J. 355; Chotu v. Inayatullah, 19 Z. W. N. 191; Budh Singh v. Parbati, 4 Al. L. J. 556; Beni Ram v. Kundan Lal, 21 A. 496; Kazim v. Ram Sarup, 1929 (All.) 877; Amritsarya v. Diwan Chand, 114 I. C. 70, 1929 (Lah.) 625; Kanhaiya Lal v. Hamid Ali, 7 O. W. N. 271, 122 I. C. 774; Mahal v. Rana, 1938 (Lah.) 88, 177 I. C. 198; Dan Bahadur Singh v. Teelwand Singh, 167 I. C. 870, 1937 (Oudh) 226; Narayan v. Sankaram, 168 I. C. 842, 1937 (Mad.) 158; Abdul Kader v. Upendralal, 40 C. W. N. 1370, 1936 (Cal.) 711, Masooma Bibi v. Mohd. Said, 1942 All. 77.

belief that it has been allotted to him at the partition, and the plaintiff, while knowing that the said land had been allotted to him and that the defendant was acting under the said honest belief, did not stop him. He is, therefore, estopped by the principle of "acquiescence" from having it demolished now."

Illegality : Illegality of a contract should be pleaded along with the facts showing the illegality. Therefore it will not be enough to plead that the contract is legally void but facts rendering it void must be pleaded, e.g., that it was in the nature of a wagering contract or that it was without consideration. But if the illegality or invalidity of a contract follows from the facts alleged in the plaint itself, they need not be repeated in the written statement. Where a transaction is shown to the court to be illegal, the court can, take notice and refuse relief even if the illegality is not pleaded by the defendant.¹ Illegality

Justification : A plea of justification is usually raised in a suit for libel or malicious prosecution. Even this plea, however tempting, should not be raised without careful consideration for there are certain cases which are better defended with other pleas. Unless there is a strong hope of establishing the justification, it is best not to plead it, but to tender an apology, for an unsuccessful attempt to justify a libel naturally aggravates the original offence, and the judge is inclined to award, in such cases, a much higher amount as damages than he would if an apology was offered. Sometimes a safer defence may be available than justification, e.g., in a suit for malicious prosecution, a plea of a reasonable and probable cause may sometimes be easier to prove than one of the truth of the charge. In all cases, therefore, when it is intended to plead justification for any apparently wrongful act committed by the defendant, the pleader should consider whether any other defence is also open to the defendant, and, if that is more substantial and easier of proof than Justification

¹ *Narayana v. Ramalingan*, 1933 (Mad.) 187, 145 I. C. 599. *Sm. Saibalani Devi v. Phanindra Mohan Mozumdar* A. I. R. 1965 S. C. 1364.

that of justification, the latter plea better be omitted. If, however, the plea of justification, is one which the defendant can easily prove, or, at any rate it is not more difficult of proof than any alternative plea, it should be pleaded by all means, but the defendant must fully understand the responsibility of pleading it. Full particulars will also have to be given. The plea must be a justification of the exact charge, and definite and unequivocal words should be used. If a specific charge is justified by a plea of truth, it is sufficient simply to say so, but if the charge is a general one, instances must be given as particulars to justify the charge.

Laches

Laches or delay in filing a suit however long, is no defence unless it amounts to waiver, abandonment or acquiescence.¹ Acquiescence, properly speaking, relates to inaction during the performance of an act while laches relates to the delay after the act is done. Delay can certainly be good evidence of acquiescence or waiver, but what should be pleaded as a defence should be the acquiescence, waiver or abandonment and not the delay which is only an evidence of it.

Transferee
from
ostensible
owner

Section 41. Transfer of property Act : A defence under this section can be raised only by setting up in the written statement a definite and clear plea satisfying *all* the terms of the section.² Even if one ingredient is left out the court is not bound to take notice of the plea. The defendant should definitely plead that he has taken the transfer for value, that he has done so from a person who was the ostensible owner, and that he had done so in good faith believing that such person had the power to transfer. A vague plea that the defendant is protected by Sec. 41 is not good, as it would amount to pleading law.

V—Set-Off

Legal set-
off

A defendant to a suit for recovery of money cannot only defend that suit but can also claim a set-off in respect

¹ *Murarilal v. Balkishan*, 95 I. C. 636, 1926 (Nag.) 416.

² *Sheogobind v. Anwar Ali*, 116 I. C. 779, 1929 (Pat.) 305.

of any claim of his own, and if his claim exceeds that of the plaintiff, he can make a claim for a decree for the amount in excess.¹ Such a plea of set-off will be tried as if the defendant had brought a suit and will be determined even if the plaintiff's suit is dismissed or withdrawn.² There are certain conditions under which a claim by way of set-off is allowed.³ They are as follows :—

- (1) The sum claimed must be ascertained;
- (2) It must be legally recoverable, i.e., it must not be barred by limitation;
- (3) It must be recoverable by the defendant, or by all the defendants if there are more defendants than one;
- (4) It must be recoverable from the plaintiff, or all the plaintiffs if more than one;
- (5) The claim must not exceed the pecuniary limit of the jurisdiction of the court in which the suit is brought.
- (6) Both parties must fill the same character in the defendant's claim as they fill in the plaintiff's, e.g., no set-off for money claimed by a defendant in a personal capacity will be allowed in a suit against him as an executor.

The condition that the sum claimed must be "ascertained" is important. It excludes all claims for un-liquidated damages and mesne profits, the amount of which is not ascertainable until the court determines it.⁴ But the fact that simple arithmetical calculation is necessary to arrive at the sum which the defendant should recover is no ground for holding that the sum is unascertained. For example, interest may be calculated according to the contractual rate.

¹ O. 8, 6, O. 20, R. 19.

² *Bansidhar v. Lalta Pd.*, 1934 (All.) 543, 1934 A. L. J. 293, 150 I. C. 343; *Moideen v. R. M. P. Chettyar Firm*, 152 I. C. 552, 1934 Rang. 160.

³ *Jamnadas v. Beharilal*, 1941 (Nag.) 258, O. 8, R. 6.

⁴ *Kishorchand v. Madhowju*, 4, B. 407.

A plaintiff sued for the balance of price of certain articles sold. The defendant pleaded that this transaction formed part of a number of transactions between the parties in which there were payments to be credited on both sides, and, at the date of suit, a definite known balance was due to the defendant. *Held* that this was a claim for an ascertained sum.¹ As regards limitation it has been held that the claim must be within limitation of the date of suit and not necessarily on the date of filing the written statement² but if the defendant does not merely claim a set-off but claims surplus from plaintiff by way of counter-claim he must show that his claim is within time on the date of making it.³

Equitable
set-off

In addition to this legal set-off, equitable set-off of even unascertained sums, as damages, is also allowed, provided that both the cross-demands arise out of one and the same transaction or are so connected in the nature and circumstances that they can be looked upon as parts of one transaction.⁴ In such cases, the cross demand may even be barred by limitation.⁵

For example, if A sues B for the price of 120 bales out of 200 agreed to be supplied by him, B may claim, by way of set-off, damages for non-delivery of the remaining 80 bales. In a suit for salary by a servant, the master can claim to set-off damages sustained by him by reason of the plaintiff's neglect and misconduct.⁶ In a suit by a washerman for his wages, the defendant may set-off the value of clothes

¹ *Firm Ram Sarup Radhakishen v. Harprasad*, 22 A. L. J. 844.

² *Budhu v. Sital Singh*, 179 I. C. 192, 1939 (Pat.) 142; *Uma Pd. v. Shiva Kant*, 181 I. C. 1006, 1939 (Pat.) 567.

³ *Bharat v. Chet Ram*, 105 I. C. 105, 1933 A. L. J. 286, 1933 (All.) 427; *Rai Harendranath v. Rai Somendranath*, 1942 (Cal.) 559.

⁴ *Apaji v. Noor Mohammad*, 1936 A. M. L. J. 10.

⁵ *Lakshmi Narayan v. Mt. Ganesha*, 1945 (Oudh) 229; *Sheo Saran v. Mohabir*, 32 Cal. 576. *Bur See contra Vjraavan v. Deivasikamma*, 1917 (Madras) 258, 39 Mad. 1939.

⁶ *G. Chisholm v. Gopal Chunder*, 16 C. 711 (*Contra*, *Victoria Mills Co. v. Brij Mohan*, 29 A. 362, Where the master was not allowed to set off a month's salary in lieu of notice).

not returned by the plaintiff.]¹ In a principal's suit for accounts against his agent's surety, the latter can set-off the agent's wages.² In a suit by seller for unpaid purchase-money the buyer can claim set-off for the mesne profits of the land sold.³

In the same way, although legal set-off can be claimed only in respect of that debt which is legally recoverable, i.e., which is not barred by limitation on the date of the written statement,⁴ yet a time-barred debt may be set-off on equitable grounds provided that both the claims relate to the same property or estate, but not otherwise.⁵ So, in a suit by an heir against a co-sharer for his share of the property, the latter can set-off the Government Revenue paid by him.⁶ In mortgage suits sums are allowed to be set-off which are found due to the mortgagor on accounting.⁷ In a suit for contribution of rent between co-tenants, the defendant may claim set-off in respect of rent paid by him for previous years, though the suit for the same may be time-barred.⁸ But while such a set-off of barred claims is allowed on equitable grounds, it can be allowed only to the extent of the plaintiff's claim, but not so as to entitle the defendant to claim a decree for the excess by way of counter-claim,⁹ for O. 20, R. 19, C. P. C. under which such a decree can be pressed applies only to legal set-off and not to equitable set-off.

A party is not bound to claim a legal set-off but may bring a separate suit for the recovery of money claimed by

¹ *Maiden v. Bhondu*, (1910) Punjab Rec. No. 77.

² *Kalanand v. Sri Prasad*, 17 C. W. N. 1050, 19 I. C. 901, 19 C. L. J. 152.

³ *Sakhamuri v. Nimmaraju*, 1948 Mad. 430, 1948 M. W. N. 260. 1948 & 1 M. L. J. 290.

⁴ *Kanailal v. Nitya Saran*, 37 I. C. 938.

⁵ *Villuappa v. Krishna*, 44 I. C. 428, 34 M. L. J. 32.

⁶ *Ramdhan v. Permanand*, 19 C. W. N. 1183.

⁷ *Sheo Saran v. Mahabir*, 32 C. 576; *Parasuram v. Venkatachalan*, 25 M. L. J. 56; *Nathan Prasad Shah v. Kali Prasad Shah*, 1926 (Pat.) 77, 90 O. C. 785.

⁸ *Abdul Majid v. Kulsam*, 1925 (Cal.) 1146.

⁹ *Narasimha Rao v. Sree Raja Srinivasa*, 42 M. 823, 37 M. L. J. 193, 53 I. C. 234, 10 L. W. 183, 26 M. L. J. 276.

him¹] but an equitable set-off should always be pleaded in the first suit.²

A claim of set-off must be specifically made in the written statement, and no claim can be made unless the defendant files a written statement.³ It should be raised after the defence to the plaintiff's claim. It should give all the particulars of the set-off, the amount claimed, the cause of action for the amount, the person to whom and by whom it is due, and the date on which it became due. The whole amount due to the defendant must be claimed, otherwise O. 2, R. 2, C. P. C. will bar the defendant's right to bring a separate suit for the portion relinquished.⁴

After stating all the particulars of the claim of set-off, the defendant must end as follows :—

“and the defendant claims to set-off that sum against the plaintiff's claim in this suit³” adding, if necessary, “and prays for judgment in his favour for the amount of his claim which may be found to be in excess of the plaintiff's claim.”

Court-fee must be paid on the valuation of the claim of set-off,⁵ both legal and equitable.⁶ It is payable on the whole amount claimed by the defendant and not only on the amount claimed in excess of the plaintiff's claim.⁷ It has been held that if court-fee is not paid on the written statement, the court should not demand it but should refuse to entertain the claim⁸ as it is not a case of deficient, but of no court-fee. The Patna High Court has, however, taken a more lenient

¹ *Suttama v. Anugodu*, 1925 (Mad.) 830.

² *Ameenammal v. Meenakshi*, 60 I. C. 226, 12 L. W. 173.

³ *Mrs. C. Simon v. Arogiasami*, 25 I. C. 361, 16 M. L. J. 122.

⁴ *Nawbut v. Mahesh*, 32 C. 654 (659); *Kathersa v. Abdur Rahim*, 1942 (Mad.) 580.

⁵ Sch. 1, Art. 1, Court Fees Act.

⁶ *Shiromani Sugar Mills v. Sukan Chand*, 1938 All. 522; *Ratanlal v. Madari*, 1950 A. L. J. 706.

⁷ *Jugal Kishore v. Bankey Bihari*, 1935 (Pat.) 110; *Girdharilal v. Surajmal*, 1940 (Nag.) 177, 190 I. C. 651.

⁸ *Muthu Erulappa v. Vunuku*, 36 I. C. 957.

view and applying Sec. 149, C. P. C. has held that court-fee might be accepted at any stage.]¹

A plea of set off should be distinguished from one of adjustment. In the latter case the plaintiff's claim is alleged to have been paid or adjusted prior to suit. In the former the adjustment is desired after the written statement.²

A plea of adjustment is nothing else but a plea in the nature of payment. It cannot form the subject-matter of a separate suit like a set-off or a counter-claim. As to court fee on a claim for equitable set-off, it has been held in some cases³ that no court fee is payable; but a different opinion has been taken in other cases⁴. Court fee is not required in a claim for improvements in a suit for tenant's ejectment.⁵ But in Madras and Nagpur a contrary view has been taken.⁶

The expression 'Counter Claim' finds no mention in any of the provisions of C. P. C. Still it cannot be said to be an expression foreign to law. In a number of reported cases such expressions as 'CROSS CLAIM' or 'COUNTER CLAIM' will be found to have been used in connection with the plea of Set Off. If Rule 6(2) of O VIII is read with R. 19(1) of O. XX, C. P. C. the outcome will be a counter-claim. Under the former the written statement with a plea of Set off has to be treated as a plaint, while under the latter, the court, if a plea of set off is allowed against the claim of the plaintiff, has to state in the decree, "What amount is due to the plaintiff and what amount is due to the defendant."

¹ Jugal Kishore *v.* Bankey Bihari, 1935 (Pat.) 110.

² Chandra Dutt Tiwari *v.* Shanti Ram A. I. R. 1967 Pat. 358 Haji *v.* Shivji & Co. *v.* Haji Dev Raj & Co I. L. R. (1963) Guj. 822.

³ Madan Mohan *v.* Bohra Ramlal, 34 A. L. J. 421, 1934 (All.) 115; Basheshwar Nath *v.* Grindlay & Co., 171 I. C. 649, 1937 (Lah.) 73; Gopal Das *v.* Jhingur Pd., 1964 A. L. J. 21 (S. O.).

⁴ Laxmidas *v.* Nanabhai, 1964 (S.C.). 11, 1938 (All. 522, 1943 Bom. 227, 1950 A. L. J. 706, 1943 Nag. 314, 1954 Pat. 30.

⁵ Solemn *v.* James, 1936 A. M. L. J. 60.

⁶ Sitharam *v.* Ramanuj, 1933 (Mad.) 208, 142 I. C. 719; Girdhari Lal *v.* Surajmal, 1940 (Nag.) 177, 190 I. C. 651.

It has further to fix the amount found due from either party. That means that if the amount due to the deft. is found to be less than the amount due to the plff. a decree in favour of the plff. after adjusting the deft's claim, has to be passed. In such a case the defts. plea will be purely one of set off. If on the other hand the amount found due to the deft. is more than the plffs. claim, a decree for the excess amount has to be passed in favour of the deft. treating it to be a Counter or Cross-claim.¹ Of course, the condition is that the suit should be a money suit, that the amount should be legally recoverable and the claim should not be barred by limitation. It may further be noted that the consequence is that there will be two suits before the court and both of them have to be tried together and disposed of by the same order.

A question may arise as to what would be the fate of deft's counter-claim, if (a) the plff. fails to substantiate his claim, or if (b) he withdraws his suit, or if (c) he does not appear on the date of hearing. It is submitted that in every case the court has to go into the deft's counter-claim and have to award him a decree *ex parte* to the extent of the amount found due from the plff.² Obviously because the counter-claim partakes of the nature of a suit and plff's absence, which in most cases will be deliberate, cannot deprive the deft. from getting a decree.

It may again be stressed that a counter-claim is primarily a defence in the form of a set-off. Any amount found due to the deft. after wiping out the plff's claim becomes a counter-claim. A counter-claim which does not fulfil the requirements of O. V² III R. 6 cannot be gone into as a

¹ Harendra Nath *v.* Sorindra Nath A. I. R. 1942 Cal. 559; Laxmi Das *v.* Nanabhai 1964 (S. C.) 11, S. C.) See also 1938 All 522; 1943 Bom. 227; 1950 A. L. J. 706; 1943 Nag. 314 1954 Pat. 30.

² Jamnadas *v.* Behari Lal A. I. R. 1941 Nag. 258. For distinction between set off; and Counter Claim see Hyderabad Roller Mills Co. *v.* Vallabh Das (1964) 1 Andhra L. T. 223 T. A. M. Sanmukham Chettiar *v.* Shamsul Khan I. L. R. (1966) 2 Mad. 302 Sarasvati Oil Mills *v.* State of Gujrat (1967) 18 S. T. cases 163 (Guj.)

counter claim, e.g., when the parties do not fill the same character as shown by illustrations (a) & (b) or there is a joint debt against one person and the counter-claim is set up against only one of the joint creditors or vice versa. See Illus. (f) & (g).

In a suit for amount due on accounting in partnership business, the deft. pleaded that he had paid it off and that he advanced a further loan to the plff. the Nagpur H. C. held it to be case of counter-claim.¹ In a suit of declaration of title, possession and mesne profits of immovable property the deft. pleaded improvements to the extent of Rs. 1500/-. The Madras H. C. did not accept the deft's plea as a counter-claim.² A case of mutual accounting, where the deft claims credit for the amount due to him, was not held to be a case of set off much less a case of counter-claim³ In the case of *Laxmidas* 1964 (Supra) one partner of a firm sued the heirs of a deceased partner for specific performance of a contract, the deft. besides other pleas also set up a counter-claim on the basis of accounts. It was held to be a case of counter-claim by the S. C.

It goes without saying that court fee as on a plaint must be paid, on any plea of counter-claim.

¹ *Sundarmal v. Ganesh Narain* 171 I. C. 502, 1937 (Nag.) 210.

² *Apparswami v. Ramanatheeswara* A. I. R. 1962 Mad. 527.

³ *Popular Bank Ltd.* 1959 Ker. 11.

CHAPTER XVI

Appeals in General

The canon of law "There is remedy for every wrong or wherever a right exists, there is a remedy for its infringement", though applicable to civil suits is not applicable to appeals. Under Sec. 9, C. P. C. a person who has a grievance of civil nature, has a right to institute a suit, unless its cognizance is either expressly or impliedly barred, to seek a remedy in the proper court. There is no such inherent right to file an appeal against an adverse decision.¹ The right to appeal can only be exercised on the basis of some statutory provision, may it be a statute or some rules or other provision having the force of a statute.² If there is such a provision the right to appeal becomes a vested right from the time of the first commencement of the action. Any subsequent change in law cannot effect that right, unless that law is to take effect retrospectively.³

Right to
appeal

The S. C. in the case of *Garikapati* laid down a number of principles with respect to right of appeal with reference to subsequent changes in law.⁴ Broadly speaking the right to appeal was held to be not a mere matter of procedure, but a substantive right. It necessarily implied that all rights to appeal continued as they were and the aggrieved party was entitled to take the dispute to higher court according to law prevailing on the date of the institution of the suit. In that sense it is a continuance of the suit, except that the dispute is now before a higher court or authority who has the power to go into the

¹ A. I. R. 1923 All (F. B.) 490.

² A. I. R. 1935 P. C. 5; 1936 P. C. 93; Also see 1953 S. C. 357.

³ 1960 S. C. 980.

⁴ *Garikapati v. V. S. Chowdhary* A. I. R. 1957 S. C. 540.

correctness or otherwise of the decision appealed against.¹

It is not that every judgment, decree or order of every court or authority is appealable. For that purpose the relevant provision of the code or the law has to be looked into. Sec. 96 C. P. C. itself contains an exception in the opening words save where otherwise expressly provided in the body of this code or by another law for the time being in force.”

Provisions
of law
governing
appeals

The provisions with respect to appeals as given in C. P. C. are :—

Appeals from original decrees are provided for in Sec. 96 to 99, while the form, the grounds of appeal, and other procedure including admission, interim orders and final orders are given in O. XLI. They are generally called First Appeals.

Appeals
from
original
decrees
i.e. 1st
appeals

Appeals from appellate decrees are given in Ss. 100 to 103 and the corresponding procedure is in O. XLII. They have the common name of second appeals or special appeals.

Appeals
from
Appellate
decrees
2nd
Appeals
Appeals
from
orders

Appeals from orders are dealt in sections 104 to 106 while O. XLIII Rule 1 gives details of the appealable orders. Under Rule 2, the procedure for hearing of such appeals is the same as given in O. XLI.

Appeals to Supreme Court are governed by Sections 109 and 110 read with O. XLV. Section 109 contains three saving clauses. Such appeals lie subject to :—

Appeals
to S. C.

(1) The provisions in Chapter IV of Part V of the Constitution i.e., Article 132, 133 and 136.

(2) Such rules as may from time to time, be made by the Supreme Court regarding appeals from the courts of India and.

(3) The provisions hereinafter made, i.e., S. 110, 112 and O. XLV, C. P. C.

¹ Ram Chand v. Ram Swarup A. I. R. 1952 All 654; Shyam Lal v. Takhatmal 1957 M. P. 98.

Jurisdiction of Appellate Court how governed

The above provisions do not deal with the question of jurisdiction of an appellate court. They only provide for the right to appeal. For filing appeals and their entertainment one has to look into various Acts prevailing in different States, such as the Bengal, Agra and Asam Civil Courts Act in U. P. and similar Civil Courts Acts in other States. However, the general pattern appears to be that an appeal from the decree of Munsif or Sub Judge or Subordinate Judge of the lowest grade (as called in some States) upto a certain valuation will lie to the District Judge, while an appeal from the decree of a Civil Judge or Subordinate Judge over a certain valuation will lie to the High Court. So far as second or special appeals go they can be filed in the High Court but only on the grounds mentioned in Section 100 as stated in Section 101. It may also be mentioned that S. 96 has no application to appeals within the High Court i.e. from a single Judge or Division Bench Judgements. Such appeals, which may be said to be inter-high court, are governed by Letter's Patent of that High Court.

Who has the right to appeal

Sec. 96, 100 & 104 of the Code relating to right to appeal only say that an appeal shall lie, without indicating as to who has the right to appeal. However, the general rule of law is that a party to a suit who was arrayed on the opposite side, including his legal representatives¹, who is adversely affected by the decision² may file the appeal enlisting his grievances in the grounds of appeal. This would not cover the cases of all the persons aggrieved by the order. The real test is whether the decision, if left unchallenged, would or would not operate as *Res Judicata* between the aggrieved person on the one hand and any other party to the suit on the other, in respect of the same subject matter in any future dispute. If it does such an aggrieved person irrespective of his position in the array of parties

¹ 1934 Mad. 360; 1949 Bom 141; 1935 Pat. 261.

² 1961 A. L. J. 473; 1961 Punj 281; 1958 Raj 181; 1942 Cal. 1. 1949 Mad. 91.

will have a right of appeal.¹ Ordinarily a co-plaintiff or a co-defendant has no right of appeal against a co-plaintiff or co-defendant, but such a right may accrue if there was a triangular fight, and the court in order to determine the matter in dispute had also to determine the rights of the plffs. or the defts. as the case may be, *inter se*.²

Before drafting the grounds of appeal the counsel should convince himself that the right to appeal still exists or that it has not been lost by (i) lapse of limitation, (ii) by waiver through agreement³ or (iii) by estoppel or any other act or conduct express or implied, of the party who has the grievance against the decree or order.⁴ The counsel should draft the grounds with such skill as to enable him to successfully cross the hurdle of admission stage even in border cases, and obtain the benefit of agitating the matter in the higher court. Since one of the purposes of law is to discourage unnecessary litigation the appellate court has been armed with the discretionary power to dismiss an appeal summarily after hearing the appellant without issuing a notice to the other party. If the appellant fails to appear, it has also the power to dismiss the appeal for his default. See O. XLI, R. II, C. P. C. This is applicable to both the first and second appeals unless otherwise provided in letters patent.⁵ The only thing necessary is that the discretion must be judicially exercised by the court and such a power should not be used when any complicated question of fact or law arises.⁶ It may also be noted that dismissal of an appeal under Sub-rule (1) is treated as a decision on merit while a dismissal for default under sub-rule (2) is not such a decision.⁷

OXLI R.
11 C.P.C.

¹ 1957 Hyd 23, 1951 Punj 444.

² 1959 Raj 127; 1935 All. 984, see also 1924 Mad. 689..

³ I. L. R. 1 All. (F. B.) 267 (269); 1925 All. 503 (506); 1935 Cal. 239; 1939 Nag. 126.

⁴ I. L. R. 35 All 168; 1936 Cal. 424.

⁵ 1920 Pat 509.

⁶ 1936 Pat. 505; 1938 Pat 330 and 608.

⁷ 1958 A. P. 768; see also 1914 P. C. 66.

S. 109, 110
& O XLV
C.P.C.

If the provisions of C. P. C. and Art. 132 & 133 are read together an appeal shall lie to the S. C. from :—

(a) Any judgement, decree or final order passed in appeal by a High Court, or any other court of final appellate jurisdiction; and

(b) Any judgement decree or final order passed by a High Court in the exercise of its original jurisdiction.

Provided the value of the subject-matter in dispute in the court of first instance and in appeal and also for appeal to S. C. was and is rupees twenty thousand (now fifty thousand by the latest amending act of the constitution) or more. If the dispute related to any property, the value of the property is also required to be the same. In case of concurrent findings, the H. C. has to certify that appeal involved a substantial question of law.

Substan-
tial
question
of Law

An exception to the above has been made in disputes involving a substantial question of law as to the interpretation of the constitution, in Art 132.¹ In such a case only a certificate of the H. C. is necessary that the case involves of substantial question of law as to the interpretation of the constitution irrespective of the nature of the case whether it is of civil or criminal nature or the valuation of the suit. The certificate should set out the grounds in support of the order² The object of this provision appears to be that divergent views of the High Court's in constitutional matters should be avoided and the Supreme judicial court of the country should alone have the last say in the matter. Art. 132 also applies to other proceedings besides Civil and Criminal, such as revenue proceedings governing seles tax and income teax cases or the contempt of court proceedings and disciplinary proceedings.³

¹ 1953 S. C. 210 (212).

² Raghubanshmani Prasad Narin *v.* Ambica Prasad Singh A. I. R. 1971 S. C. 776.

³ 1958 All. 621.

Both the said articles relate to the ordinary appellate jurisdiction of the S. C. and appeals under them will lie only if the conditions specified therein are fulfilled. However Art. 136 invests the S. C. special jurisdiction in the form of residuary powers, to meet the ends of justice, whenever a case falls outside the purview of the said two articles. The only requirement is the grant of special leave by the S. C. in this behalf.

The S. C. may in its discretion entertain an appeal by granting special leave under this article against :—

- (a) any judgment, decree, determination or order
- (b) in any cause or matter passed or made by any court or tribunal in the territory of India.

The language of this Article particularly the words “Determination”, “In any cause or matter” and “Tribunal” preceded by the clause, “Notwithstanding anything in this chapter” give a very wide jurisdiction to the S. C. It can grant special leave to appeal in all sorts of cases disposed of by courts and tribunals constituted under some statute, in the performance of judicial or quasijudicial functions as distinguished from purely administrative functions. The S. C. observed, “We can grant special leave in civil cases, in income tax cases which come before different kinds of tribunals and any variety of other cases”.¹ In an election case it was observed by S. C. ‘The powers given by Art. 136 are in the nature of special or residuary powers exercisable outside the purview of ordinary law. The constitution for the best of reasons did not choose to fetter or circumscribe the powers, in any way.’²

How wide is the scope of this article can also be gathered from the admission of the appeal, and the issue of an interim order, whatever be the ultimate result of the appeal, against the order of the Chief Election Commission, in what is

¹ Pritam Das V. State 1950 S. C. 169; Bharat Bank v. Its Employees 1950 S. C. 186.

² Durga Shanker v. Raghuraj Singh 1954 S. C. 520 (522).

known as the 'Congress elction symbol' case. The symbol had been allotted to one of the two split congress parties by the C. E. C. The order was appealed against by obtaining special leave to appeal under Art. 136, and after admitting the appeal an interim order was passed just a few days before the last general elections in Feb. 1971.

The scope of this article is also not limited to those cases where no appeal lies, but extends to those cases as well where an appeal has been provided for but no appeal has been filed. It is a different matter that the S. C. may not grant special leave to appeal in such cases.

Appeals from Orders.

What is
an order

An order has been defined in Sec. 2. (14) of the C. P. C. as 'The formal expression of any decision of a civil court which is not a decree'. It is only such orders as are covered by S. 104 and O. XLIII, R. I of the Code, against which an appeal would lie. Since S. 104 saves the appeals provided for in any other law for the time being in force, an appeal would also lie from any order which has been made appealable under such law. A second appeal from the order of the first appellate court is barred by sub-section (2) of that section.

An in-
direct
course for
appeals

S. 105 of the Code lays down another course for agitating the correctness of an order in appeal. Under sub-section (1) of that section a party while appealing from the decree may question, in the grounds of appeal, any error defect or irregularity in any order affecting the decision of the case. In a way this permits an appeal from all orders, whether otherwise appealable or not, but the two conditions given in the section must be fulfilled. One is that the order questioned in appeal must have affected the decision, while the other is that a clear objection in this behalf must have been taken in the grounds of appeal.

Court to
which
appeal lies

An appeal from an order lies to the same court which has jurisdiction to entertain an appeal against the decree in

the suit. S (106). Before filing an appeal it should be looked into whether the order is appealable, does it amount to a decree as defined in S. 2 (2) or an order under S. 2 (14) and under which provisions the appeal should be filed and whether an appeal, at all, lies.

Difficulties are often experienced in respect of orders passed in execution proceedings. If such orders are passed between the parties to the suit or their representatives and relate to execution, discharge or satisfaction of the decree, they will be appealable as decrees under S. 96 of the Code.¹ If the order is one passed under O. XXI, R. 34, or R. 72, or R. 92 of the Code, it will be appealable as provided for in O. XLIII. The other orders may be of collateral nature and may not be appealable.²

Appeals
from orders
in
execution

¹ *Adaikappa v. Chandra Sekhar*. A. I. R. 1948 P. C. 12.

² *Keshavdeo V. Radha Kishan*. A. I. R. 1953 S. C. 23.

CHAPTER XVII

Appeals (Requirements of)

Memo of
appeal

The Memorandum of appeal is not difficult to draft. It only requires to point out the errors of fact and Law committed by the lower court, in arriving at the decision. Like a plaint, it may also be divided into two parts (1) the formal part and (2) the material part.

In the formal part are included, the heading of the case, an introductory statement of the appeal giving particulars of the decree or order against which the appeal is directed, and the valuation of the appeal. Court cannot allow by amendment to convert an appeal against one decree into an appeal against another decree.¹ The material part consists of the grounds of appeal. Relief sought in the appeal is also generally written in the memorandum.

Heading

A memorandum of appeal should, like the plaint, begin with the name of the court in which it is filed. This is the proper place to state the name of the court, though in the form of memorandum of appeal given in Appendix G to the Code of Civil Procedure it is given differently.

After the name of the court, is given the number of the appeal and the year in which it is filed. As the number is noted by the officials of the court, a blank space is left for it. Then follow the names and addresses of the parties to the appeal. The name of the appellant is given first and then that of the respondent. It should also be indicated against the names of the parties what character each filled in the lower court i.e., whether he was a plaintiff or a defendant, or an applicant or an opposite party, thus :—

A. B., son of etc.

(Plaintiff) Appellant

versus

¹ Mohamad Idris v. Md. Habib, 1948 (Pat.) 97, 26 Pat. 83.

C. D., son of etc.

(Defendant) Respondent

Or

A. B., son of etc.

(Decree-holder) Appellant

versus

C. D., son of etc.

(Judgment-debtor) Respondent

After the names of the parties, an introductory statement giving the particulars of the decree or order appealed from (viz., its number and date, the court which passed it, and the name of the presiding officer), should be written in some such form as the following :—

Introductory Statement

“The above-named appellant appeals to the court of _____, from the decree of _____ Civil Judge at _____, in suit No. _____, passed on the _____ and sets forth the following grounds of objection to the decree appealed from, namely,—”

Sometimes this is written in the form of a heading, thus—

“Appeal from the decree of _____ Civil Judge at _____, in suit No. _____ passed on the _____” and the grounds of appeal follow with the heading “Grounds of appeal.”

This latter form is better and simpler. Though the former is sanctioned by the Code of Civil Procedure. (*Vide* form No. 1 App. G.).

The Presidency High Courts have prescribed forms of headings of appeal from decrees and orders passed by the High Courts in their original jurisdiction. Those forms will be found in the precedents.

Though there is nothing in the Code to require that the valuation of an appeal should be written in the memorandum of appeal, yet as *ad valorem* court-fee is very often payable, and the pleader’s fee is always calculated on the value of the appeal, and also, as sometimes an appeal is preferred only against a portion of the decree, it has become a practice, it is a very proper practice, to enter the valuation of the appeal in the memorandum. This is written either before the introductory statement, or after the grounds of appeal.

Value

Grounds
of appeal

OXLI (1) C. P. C. lays down four things :—

(a) Form of appeal, (b) Its presentation, (c) Documents to be filed, and (d) Grounds of objection. In a recent Full bench Case of 1970 M. 353, a copy of Lower Court judgment was dispensed with.

In the grounds of objection, it has to be shown, how the decision arrived at by the Lower Court is against the weight of evidence, how the facts and circumstances require it to be altered and make it erroneous.¹ The grounds should be consistent with the case put up in the Lower Court No new plea, not taken in the pleadings on which no issue was framed nor evidence was led, should be raised.²

An appellant is not entitled, as of right, to be heard in support of any ground of objection not taken in the memorandum of appeal,³ or taken but given up at the admission of the appeal⁴ though, of course, the court can, in its discretion allow him to argue any such ground.⁵ Where an objection was neither taken in the grounds of appeal nor in the lower court and the appellant seeks to raise it at the hearing, the propriety of allowing him to do so should be carefully considered by the court.⁶ The Calcutta H. C. has ruled that the Appellate Court should not allow such point to be raised.⁷ The Madras High Court refused to hear a new plea which went to the root of the opposite party's case.⁸ The Patna High Court refused to allow

¹ Chandra Kishore *v.* Dy. Commissioner A. I. R. 1949 P. C. 207.

² Shanker Lal *v.* The New Mirflasilco. A. I. R. 1940 P. C. 97. Smt. Rani *v.* Smt. Santa Bala Debnath A. I. R. 1971 S. C. 1028.

³ Swaminatha *v.* Embramsa, 98 I. C. 328, 51 M. L. J. 639; Raja Jwaleshri *v.* Babu Parchand, 1945 (P. C.) 13; Biddhichand *v.* Mt. Khichri, 1946 (Nag.) 135.

⁴ Hazura Singh *v.* Kishen Singh, 1933 Lah. 447.

⁵ O. 41, R. 2. A legal point covered by a P. C. ruling which was not published when the appeal was filed was allowed to be taken (Mt. Kalka, *v.* Choudhry Ganga, 1925 (Oudh) 435, 12 O. L. J. 206).

⁶ Bhagwan Singh *v.* Ujagar, 1940 (Pat.) 33.

⁷ Bodordoja *v.* Ajijuddin, 57 C. 10; Govardhan Das *v.* Corporation A. I. R. 1970 Cal 539 (542)

⁸ United Brokers *v.* Alagappa, 1948 Mad 391, 1948 M. L. J. 178, 1948 M. W. N. 182.

a plea of *res judicata* not taken in memorandum of appeal though raised in lower court.¹ A point not taken in the lower court cannot be argued in appeal unless it is an important question of law or a point which goes to the root of the case, e.g., a question of jurisdiction or *res judicata*, or the plaint discloses no cause of action or the written statement no ground of defence, but the point can be allowed to be argued only if it can be decided on the materials on the record. The mere fact that the materials are all on the record and the answer is plain or that the omission was due to an oversight, is, however, no ground for permitting a new point to be argued.² In a case in which the appellant claimed full interest on the ground that the agreement about its payment was not penal as held by the lower court, the Lahore High Court refused to listen to the plea that, conceding the agreement to be penal, the appellant must get some compensation under section 74, Contract Act.³ But the same High Court allowed a plea of limitation which was neither raised in the lower court nor in the grounds of appeal to be argued at the hearing,⁴ but it was not allowed when its determination involved an investigation into questions of fact.⁵ Therefore it is necessary that the appellant's pleader should, before framing the grounds of appeal, carefully consider on what possible grounds he can attack the decree or order of the lower court, and should not omit any ground which he can reasonably take. Ordinarily, if the judgment of the lower court is written as required by law, it will itself suggest the grounds to the pleader, but, when there is anything ambiguous or wanting in it, the pleader should take proper instructions, and if necessary, ask for copies of any other papers, before undertaking to draft the grounds of appeal.

¹ *Banchanidhi Kar v. Udekar*, 1949 Pat. 214. see also 1970 A. P. 258.

² *Ram Kinkar v. Tufani*, 133 I. C. 428, 1930 A. L. J. 1601, 1931 (All.) 35, 53 A. 65.

³ *Kanshi Ram v. Prem Singh*, 1926 (Lah.) 11, 89 I. C. 879.

⁴ *Dolu v. Muhammad Nathu*, 94 I. C. 251 (Lah.).

⁵ *Teju v. Ralla*, 94 I. C. 457 (Lah.).

What
grounds
can be
taken

The general rule is any mistake committed by the lower court in weighing the evidence, any mistake in the view of law entertained by the lower court, any misapplication of law to the facts of the case, any material irregularity committed in the trial of the case, any substantial error or defect of procedure, and the defect, error or irregularity of any interlocutory order passed in the case,¹ whether the same was appealable or not (except an appealable order of remand), may be made a ground of attack in the memorandum of appeal. A ground taken but not pressed in the first Appellate Court cannot be revived in second appeal.² A defendant can question the propriety of *ex parte* proceedings in an appeal from the decree.³ Against the decree itself he can either apply under O. 9, R. 13 or file an appeal but a plaintiff cannot question the propriety of an order setting aside an *ex parte* decree, in an appeal from the decree ultimately passed.⁴

The general rule besides being subject to S. 100 C.P.C. is also subject to two conditions : (1) That the mistake of the lower court should be material, i.e., it should be such as affects the decision, and (2) that the objection taken must be such as arises from the pleadings and evidence in the lower court.⁵

Each of these two conditions will be separately discussed :

Immaterial
ground

(1) *That the mistake should be material.* If the lower court has come to a wrong finding on a question of fact or law, and the decision of the lower court is not based upon it, and the case would not be affected even if this wrong finding be reversed, the finding is immaterial and need not be challenged in appeal. It will be *mere obiter dictum*. But, though the point was not really material, yet the lower

¹ Sec. 105, C. P. C.

² Narayan v. Behari Lal, 1926 (Nag.) 160.

³ Syed Mazhar v. Sheikh Rafiq, 1925 (Oudh) 645; *contra* Sadhu v. Kuppan, 30 M. 54, 10 M. L. J. 479.

⁴ M. S. Mahomed v. Collector of Toungoo, 102 I. C. 379, 5 R. 80.

⁵ Nuzur Ally v. Ojoodhyaram, 10 M. L. A. 540.

court has taken it into consideration in coming to its decision and it has influenced the judgment, an objection should be taken in the grounds of appeal that the lower court committed an error in basing its decision on a fact which was not material. If, again, there are two issues, both of which are decided against the appellant, the appellant must attack both the findings, although if one is found in his favour, the other becomes immaterial. For instance, in a suit by an alleged lessor against an alleged lessee, the lessee denies that he is a tenant and also pleads that the alleged tenancy has not been determined by a proper and valid notice. The lower court finds against the defendant on both the points. Here, although, the defendant is entitled to succeed if he only proves that no valid notice was served upon him, yet he should attack the adverse finding on the issue of tenancy also, unless, of course, the finding is not open to objection, or the appellant chooses to acquiesce in it. When the finding is obviously correct and unimpeachable it is wiser not to attack it. Similarly no irregularity, error or defect, which does not affect the merits of the case or the jurisdiction of the court, is material in appeal,¹ and it should not be set up in the grounds of appeal.

(2) *The objection taken must be such as arises from the pleading and evidence in the lower court*, i.e., the appellant cannot make out an entirely new case in appeal² or a case inconsistent with that set up by him in the lower court.³ He cannot even raise a plea inconsistent with his statement of

New
ground in
appeal

¹ Sec. 99, C. P. C.

² *Indur v. Radha*, 19 C. 507, 19 I. A. 90; *Annamalay v. Pitchu*, 28 M. 122; *Sripal v. Harihar*, 26 C. W. N. 739, 1922 (P. C.) 51, 31 M. L. T. 38; *Budh v. Kawnain*, 19 I. C. 430; *Phulram v. Aiyub Khan*, 49 A. 52; *Ram Autar v. Beni Madho*, 102 I. C. 3 (Oudh); *Jiwan Ram v. Hussain*, 102 I. C. 631 (Lah.); *Mangtu v. Sec. of State*, 1940 (Pat.) 161, 187 I. C. 727; *Basdeo v. Jugrai*, 1948 Oudh 247, 1948 O. W. N. 156. *Kartar Singh v. Union of India*, A. I. R. 1971 S. C. 2020; *K. L. Selected coal v. S. K. Khanson* A. I. R. 1971 S. C. 437.

³ *Illahi v. Sher Ali*, 26 A. 331; *Iqbal v. Wasi Fatima*, 45 A. 53, 24 A. L. J. 920.

the case in the trial court at the commencement of the trial.¹ Where plaintiff claimed a property on the ground of his adoption by the last owner and defendant claimed title on the ground of a gift or will from the latter, and both courts in India found against defendant's title, he was not allowed by the P. C. to found his case on possession.² A plea not taken up in the plaint nor embodied in issues cannot be taken,³ but when a plea was not specifically put in issue in the lower court, it was permitted to be taken in appeal on the ground that the issues were wide enough to cover it, and all the documents relating to the plea were before the court so that no question of surprise or prejudice to the other party could be said to arise.⁴ To this general rule, however, there are certain well recognised exceptions.⁵ For instance, an objection regarding the irregularity of procedure or the jurisdiction of the lower court, or an objection of *res judicata* or limitation⁶ or a 'plea to show a fundamental flaw in the case,'⁷ or any other pure question of law,⁸ may be raised in the appeal, provided that the objection appears on the record as it stands and no fresh evidence

¹ Muhammad Mashuq Ali *v.* Hurunnissa, 114 I. C. 113, 1929 (Oudh) 209; Sodhi Lal Singh *v.* Fazal Din, 1933 (Lah.) 1045.

² Nataraja Pillai *v.* Subbaraya, 1949 P. C. 43.

³ Pirthi Singh *v.* Raja Muhammad Ali, 13 O. L. J. 126, 94 I. C. 188, 1926 (Oudh) 427; Balkaran *v.* Dulari, 97 I. C. 292, 24 A. L. J. 920; Gaurishankar *v.* Keshabdeo, 27 A. L. J. 304, 114 I. C. 881, 1929 (All.) 148; Behari *v.* Chhote, 1933 All. 911; Motiram Nihalchand *v.* Bisheshar Nath, 171 I. C. 816, 1937 (Pesh.) 97; Gopalsing *v.* Mutual Indemnity & Finance Corpn., 170 I. C. 983, 1937 (All.) 535; Kotah Match Factory *v.* State of Rajasthan A. I. R. 1970 Raj 118.

⁴ Thakur Sheo Singh *v.* Rani Raghubans Kunwar, 32 I. A. 203 27 All, 634; Parbhu Narain *v.* Jitendra Mohan, 1948 Oudh 307.

⁵ Jadunandan *v.* Bechan, 116 I. C. 870, 1929 (All.) 442.

⁶ Byom Kesh *v.* Madhabji Meta Masu, 193 I. C. 873, 1939 (Pat.) 421.

⁷ Mirza Mohammad Sadiq *v.* Fakhr Jahan, 2 Luck. 521, 117 I. C. 385, 1925 (Luck.) 97.

⁸ Krishnabai *v.* Savalaram, 29 Bom. L. R. 60, 41 B. 37, 100 I. C. 582, 1927 (Bom.) 93; Lallusing *v.* Ramnandan, 1930 A. L. J. 156, 1930 (All.) 136; Annappa *v.* Krishna, 60 I. C. 1001, 1936 (Bom.) 412; Krishna Prasad *v.* Secretary of State, 1936 (Cal.) 774. State of M. P. *v.* H. H. D. H. Bhiwandiwalla A. I. R. 1971 M. P. 65.

is necessary to substantiate it,¹ but not if fresh evidence is necessary.² The Court may also interfere in second appeal if the first appellate Court failed to consider material evidence.³ The Court can disallow even a point of law in second appeal if it set up a new right entirely different from that claimed in original court.⁴ The Bobmay High Court refused to allow the Secretary of State in a suit by a government servant for damages for wrongful dismissal to take a plea that the contract of service was not binding on him unless it was executed in the manner laid down in S. 30, Government of India Act, when it was not taken in defence in the trial court.⁵ A plea involving questions of fact cannot be taken, by a party⁶ or even by a court *suo motu*.⁷ The High Court in second appeal may in order to do substantial justice permit a plea not urged in the plaint to be taken when the defendant's own document supports it and when it was raised in the lower appellate court without objection.⁸ Although a plea of limitation may have been taken in the written statement and in the grounds of appeal, if no issue

¹ Chittori Subamna *v.* Kudappa Subama A. I. R. 1965 S. C. 1325; Ahsanulla *v.* Huri Churn, 20 C. 86, 19 I. A. 191; Subbiah Thevar—*in re*, 164 I. C. 973, 1936 (Mad.) 700; Pappa Ammal *v.* Panchavarnam Ammal, 163 I. C. 364, 1936 Rang. 260; Kokhiram *v.* Chaman, 160 I. C. 1096, 1936 Pat. Gurditsingh *v.* Sherkhan, 164 I. C. 30, 1936 Lah. 448; Yakub *v.* Kariman, 66 I. C. 466; Allan *v.* District Board of Manbhum, 5 Pat. L. J. 359, 58 I. C. 749, 1920 (Pat.) 193; Gandappa *v.* Girimallappa, 19 Bom. 331; Fakirchand *v.* Ananda, 14 C. 586; Sayamma *v.* Punam, 35 B. L. R. 850, 1933 (Bom.) 413; Shiam Pratap *v.* Baisini, 1940 (All.) 353, 189 I. C. 757.

² Shyamlal *v.* Sundarlal, 171 I. C. 868, 1937 (All.) 661; Secretary of State for India *v.* Ganesh Narayan, 1937 (Bom.) 456; Sunil Kumar *v.* Sisir Kumar, 1940 (P. C.) 30.

³ Radaha Nath Seal *v.* Haripada Jana A. I. R. 1971 S. C. 1049.

⁴ Pappa Ammal *v.* Panchavarnam Ammal, 163 I. C. 264, 1936 (Rang.) 260.

⁵ Secretary of State *v.* Yadavgir, 1936 (Bom.) 19, 160 I. C. 505, 60 B. 42.

⁶ *fi*Sita Ram *v.* Ganesh Prasad, 101 I. C. 683, 4 O. W. N. 380; Basdeva *v.* Shantanand, 50 C. L. J. 513, 1929 (P. C.) 266, 57 M. L. J. 771; Manra Khan *v.* Parmanand, 18 N. L. J. 149, 158 I. C. 263, 1936 (Nag.) 185.

⁷ Lajpat Rai *v.* Soban, 110 I. C. 71, 1929 (Lah.) 432, 11 Lah. J. L. 91.

⁸ Indrasan *v.* Kabutra, 119 I. C. 556, 1929 (Pat.) 237.

is directed to bear upon the question before the trial judge and the point has not been argued at the trial, it cannot be argued in appeal.¹ In a case where plaintiff claimed certain property as an heir of a woman who, he alleged, was living in adultery with the defendant and the defendant pleaded that she had been legally married with him and the court held marriage proved, the Nagpur High Court refused to look into the evidence to see whether the marriage was in an approved form or Asura form which did not give any right of succession to the defendant.² This, it is submitted, was not a correct view as when the plaintiff did admit marriage it was for the defendant, to show not only that he had been married with her but also that the marriage was in an approved form giving him a right of inheritance. The mere fact that the point was left out by inadvertence or that there are sufficient materials on the record for decision is no ground for allowing a new objection.³ Where plaintiff had several opportunities to amend the plaint and did not include the new plea sought to be raised and the plea raised not only a question of law but also one of fact, he was not allowed to take it in second appeal.⁴

The Allahabad High Court has held that a new point not taken in appeal before a single judge can be taken in Letters Patent Appeal⁵ but the Bombay High Court has taken a contrary view.⁶ An affirmative plea of prescription cannot however be taken in appeal.⁷ The Privy Council did not allow points to be argued which were not argued

¹ Virayya v. Adenna, 1930 (P. C.) 18.

² Koru v. Lola, 1948 Nag. 141.

³ Ram Kinkar v. Tufani, 1931 (All.) 35, 133 I. C. 428, 1930 A. L. J. 1601; Sharifa Begum v. Court of Wards, 1940 (Lah.) 475.

⁴ Tukaram v. Madhorao, 1948 Nag. 293.

⁵ Jagannath v. Sheo Narain, A. I. R. 1930 (All.) 281. *Contra*, Mewa v. Tara, 145 I. C. 416, 1933 Lah. 685; Gurdas Singh v. Director 1964 Punj. 117; Hussain Bhai v. Motilal, 1963 Bom. 208.

⁶ Shripad Shivram v. Shivaram Bhikaji, 152 I. C. 1031, 36 Bom. L. R. 1052, 1934 (Bom.) 466.

⁷ Gulab Rao v. Manjoolabai, 109 I. C. 293, 1928 (Nag.) 203.

in the High Court,¹ or which were irreconcilable with the case put forward in the pleading.²

The following pleas have been held to be those which can be advanced for the first time in appeal :—

(1) Examples of new grounds which can be taken

A plea of jurisdiction³ or a plea of estoppel affecting jurisdiction⁴ based on facts on the record,⁵ an objection about maintainability of suit⁶ a plea that the suit falls under S. 92 C. P. C.,⁷ or a plea that the suit is not instituted by all persons who got consent,⁸ a plea of limitation apparent on the face of the record,⁹ and not depending on fresh evidence,¹⁰ a plea of *res judicata* which can be decided from the record before the court,¹¹ but not one which cannot be determined without further evidence,¹² a plea of *res judicata* arising subsequently by the final decision of a former suit after the decree appealed from,¹³ or in fact any legal plea

¹ Albert West Nead *v.* King, 1948 P. C. 156.

² Paul Couvreur *v.* M. G. Shapiro, 1948 P. C. 192, Brijlal *v.* Govind Ram, 1937 P. C. 192.

³ Rammayya *v.* Subbarayadu, 13 M. 25; Ramnath *v.* Harimati, 50 I. C. 322; Ramaswamiah *v.* Poddatur Coop. Bdg. Society, 1937 (Mad.) 112; Nathu *v.* Jewal, 150 I. C. 767, 1934 A. L. J. 488, 1934 (All.) 893; (first time in L. P. Appeal) Ram Rup *v.* Manager, Court of Wards, 147 I. C. 910, 11 O. W. N. 193, 1934 Oudh 55; Brij Mohan *v.* Chandrabhagabai, 1948 Nag. 406, Chief Kwame Asante *v.* Chief Kwame Tawai, 1949 P. C. 171 *Contra* Kadir *alias* Kadu *v.* Srimati Koleman, 39 C. W. N. 876, 62 Cal. 1088, 61 C. L. J. 342.

⁴ Mahabir *v.* Narain, 1931 A. L. J. 715, 1931 (All.) 490, 134 I. C. 236.

⁵ Abdulla Shah *v.* Mohammad Yakub, 1938 (Lah.) 558, 178 I. C. 436.

⁶ Nagabhushamma *v.* Seethamma, 18 Mys. L. J. 409.

⁷ Sukhumal *v.* Uttamchand, 1937 (Sind) 230, 171 I. C. 344.

⁸ Mulchand *v.* Har Kishandas, 1941 (Sindh) 88, 194 I. C. 461.

⁹ Ramchand *v.* Dewanchand, 1933 (Lah.) 1044; Lachmi *v.* Ram Rup, 1944 (P. C.) 24; Benugopal *v.* P. Gopala, 1946 (Mad.) 459; Madhav Prasad *v.* Chandravarkar, 1949 Bom. 104, 650 Bom. L. R. 747.

¹⁰ Ramanand *v.* Nand Kishore, 1937 (Lah.) 290, 174 I. C. 837.

¹¹ Ahsanulla *v.* Huri Churn, 20 C. 86; Sudhamoyee *v.* Bhujendra; 1935 (Cal.) 713, 159 I. C. 370; Durbali *v.* Shib Charan, 9 O. W. N. 1052, Sheoraj *v.* Mudde Khan, 1934 (All.) 868, 149 I. C. 797, 1934 A. L. J. 809; Ishkali *v.* Thakur Prasad, 20 N. L. J. 159. Oudh Chief Court disallowed the plea in 3rd appeal Muhammad Ahmad *v.* Jamal Ahmad, 1944 (Oudh) 220.

¹² Jagdish *v.* Kour Hari, 164 I. C. 17, 1936 (P. C.) 258 Ikramullah Khan *v.* Rahim Bux, 1934 (All.) 770, 149 I. C. 93.

¹³ Rangayya *v.* Ramayya, 1941 (Mad.) 815.

not depending on disputed facts,¹ a claim of title by adverse possession, if such a case arises on facts stated in the pleadings and the other party is not taken by surprise,² but not if the facts are not mentioned and the plea is not put in issue,³ or where there is no evidence and the plea cannot be decided without remand,⁴ a plea in second appeal that pre-emption suit must fail as all that was sold could not be pre-empted,⁵ a plea that the suit did not include all the property sold,⁶ a plea of absolute privilege in a defamation case,⁷ a plea that plaintiff is not entitled to interest on certain transactions;⁸ a plea that suit is barred by S. 47, C. P. C.,⁹ necessity of a notice to quit,¹⁰ plea of absence of notice to quit and termination of tenancy in a suit for ejectment¹¹ legality of the sale of a religious office,¹² invalidity of a lease, though the suit originally was based on an alleged forfeiture of tenancy;¹³ an objection that a document is compulsorily registrable,¹⁴ or an objection to the validity of presentation for registration¹⁵ or an objection as to the evidence being irrelevant;¹⁶ an objection to the frame of suit when

¹ Radhabai *v.* Gopal, 1944 (Bom.) 50; Badri Narayan *v.* Beni Madho, 1945 (Pat.) 186.

² Kassim *v.* Hazra, 60 I. C. 165, 32 C. L. J. 151; Satyendra *v.* Sashi 48 I. C. 448; Mt. Batisa *v.* Rajaram, 92 I. C. 177, 1926 (Pat.) 192; *Contra* Alimuddin *v.* Salim, 117 I. C. is— (Pat.).

³ Rjana *v.* Musaheb Ali, 1935 (Oudh) 387, 155 I. C. 23, 1935 O. W. N. 423.

⁴ Natha *v.* Sri Ram, 1938 (Lah.) 128, 175 I. C. 106; Kishun Pd. *v.* Subbratan, 1937 A. W. R. 718, 1937 (All.) 696.

⁵ Abdul Hafiz *v.* Manohar Lal, 183 I. C. 604, 139 (Oudh) 233.

⁶ Sitla Sahai *v.* Sri Ram, 185 I. C. 10, 1939 A. W. R. (P. C.) 291.

⁷ Madhab C. *v.* Nirod, 184 I. C. 637, 1939 (Cal.) 477.

⁸ Ramanna *v.* Abdul, 180 I. C. 300, 1939 (Rang.) 42.

⁹ Sat Narain *v.* Chandra Mohan, 1940 (Oudh) 27.

¹⁰ Dhondu *v.* Madhavrao, 18 B. 110; Sahebodin *v.* Gouri Shankar, 185 I. C. 25 (Oudh).

¹¹ K. Narayanan *v.* A. Kunhan, 1949 Mad. 127, 1947 M. W. N. 775, 197—2 M. L. J. 559.

¹² Kuppa *v.* Dorasami, 6 M. 76.

¹³ Lakshminarayan *v.* Packiri, 88 I. C. 392.

¹⁴ Krishna Prasad *v.* Secy. of State, 1936 (Cal.) 774.

¹⁵ Braq Raza *v.* Akbari, 1940 (Oudh) 152, 185 I. C. 441.

¹⁶ Muthu *v.* Pachayammal, 1943 (Mad.) 749.

patent on the record,¹ e.g., a plea under Order 1, Rule 2²; a plea regarding validity of a contract;³ a plea that the lease was really a sale⁴ in a suit for possession on the ground of an alleged sale dismissed on defendant's plea that the transaction was a mortgage, the plea to claim relief on the basis of the mortgage;⁵ a plea that a partnership cannot sue because it was not registered;⁶ a plea of jurisdiction if it can be decided without entering into facts;⁷ when a party confined his case in the trial court to S. 20 of the Limitation Act, 1908, a case under S. 19 of the Act if supported by evidence on record;⁸ a plea in Letters Patent Appeal that the second appeal to H. C. was barred by S. 102.⁹ Where the plaintiff's case based on the allegation that the consideration for the Khatas in suit was cash was found not to be true, the plaintiff was allowed in second appeal to prove what the real consideration was and to ask for a decree on the basis that the consideration was a past debt. It was held that in view of the custom in the country of generally describing in the bonds existing liability as cash consideration, the H. C. held that the plaintiff's plea in appeal did not amount to a new case.¹⁰

The following pleas have been held to be those which are not allowed to be taken for the first time in appeal :— (2) Examples of new grounds which cannot be taken

An objection of a formal defect which could have been cured if the objection had been taken in the lower court,¹¹

¹ *Kishen v. Sham Lal*, 109 I. C. 867.

² *Ganga Ram v. Mathura*, 1932 (All.) 510, 54 A. 65.

³ *Krishnaji v. Secy. of State*, 1937 (Bom.) 440, 172 I. C. 431.

⁴ *Thakur Govindji v. Thakur Rangji* 1963 A. L. J. 587.

⁵ *Kimatrai v. Gokaldas*, 1930 (Sindh) 98, 125 I. C. 828.

⁶ *Lokramdas v. Tharumal*, 184 I. C. 88, 1939 (Sind.) 206.

⁷ *Khudmukhtar Bank v. Bhagwandin*, 1935 (Oudh) 325, 155 I. C. 92, 1935 O. W. N. 487.

⁸ *Satgurnath v. Brahma Dutta*, 168 I. C. 799, 1937 (Oudh) 391; *Bajyahari v. Tarachand*, 1948 Nag. 308.

⁹ *Kamion v. Paramananda*, 1940 (Cal.) 528, 191 I. C. 39.

¹⁰ *Kastur Chand v. Manak Chand*, 1943 (Bom.) 747, 45 Bom. L. R. 837.

¹¹ *Dharam Das v. Shamma Sundrai*, 3 M. I. A. 229; *Paramsiva v. Krishna*, 14 M. 498.

e.g., that of defect of parties¹, non-joinder of a member of a joint Hindu family,² or objection to frame of suit,³ or about absence of cause of action,⁴ want of notice of suit against a public officer,⁵ or a municipal committee;⁶ a plea of Order 2, Rule 2, C. P. C.;⁷ a plea that the suit was cognizable by Small Cause Court;⁸ a plea that sale for arrears of cost was without jurisdiction as no certificate as required by S. 4 Bihar and Orissa Public Demands Recovery Act had been filed⁹ a plea in second appeal that no appeal should have been entertained from a preliminary decree after a final decree had been passed and that all parties were not joined in the first appeal;¹⁰ a plea of bar of Sec. 47, C. P. C.;¹¹ a plea of estoppel;¹² a plea of novation of contract,¹³ a plea of absence of notice before cancellation of a security bond¹⁴ in a mortgage suit defended on the ground of want of legal necessity and thrown out on the single issue of legal necessity, the plea that the defendants were not born on the date of the mortgage and could not dispute its validity,¹⁵

¹ Chandranath *v.* Janki, 145 I. C. 325, 1933 (Pat.) 270.

² Bachu *v.* Nalumi, 1935 (Pat.) 476.

³ Girraj *v.* Sanka Pd. 1937 O. W. N. 1169, 171 I. C. 927, 1938 (Oudh) 33.

⁴ Makarram *v.* S. Hardat Singh, 196 I. C. 301, 1941 (Pesh.) 59.

⁵ Naraindeen *v.* Ramdas, 8 W. R. 425; Charu Chandra *v.* Snigdhendru, 1948 Cal. 150, 52 C. W. N. 112.

⁶ Municipal Committee *v.* Chatri Singh, 1 A. 269.

⁷ Maung Pe *v.* Ma Lon Ma Gale, 8 A. L. J. 739, 13 Bom. L. R. 464, 14 C. L. J. 15, 11 I. C. 497; Amar Singh *v.* Tulsi Ram, 1949 Nag. 195.

⁸ Sampat *v.* Bhujang, 98 I. C. 1071, 1927 (Nag.) 120.

⁹ Lachmi Kant *v.* Rameshwar, 1948 (Pat.) 104.

¹⁰ Sibnarain *v.* Abdul Gani, 94 I. C. 417 (Cal.).

¹¹ Ram Rup *v.* Manager, Court of Wards, 147 I. C. 910, 1934 (Oudh.) 55, 11 O. W. N. 193; Mahangu Singh *v.* Jhumaklal, 18 N. L. J. 110.

¹² Sudhamoyee Basu *v.* Bhujendra Nath, 159 I. C. 370, 1955 (Cal.) 713; Jado Singh *v.* Bishunath, 196 I. C. 984; Kumar Prativa Nath *v.* Benod Behari, 61 C. L. J. 75; Gopal *v.* Jagannath, 37 B L. R. 471; Jacob *v.* Co-operative Society, 189 I. C. 48, 1940 (Lah.) 193, but if necessary facts have been pleaded and proved the defence of estoppel which is only an inference from such facts may be pleaded in appeal, Madan Gopal *v.* Sundaram, 1940 (Rang.) 172.

¹³ Shivajiram *v.* Gulabchand, 1941 Nag. 100, 194 I. C. 806.

¹⁴ O. A. Narayanswami *v.* S. A. Narain Ayyangar, 1943 (Mad.) 288.

¹⁵ Ram Ratan *v.* Kapil Deo, 1923 (All.) 20.

the plea of legal necessity;¹ the plea of want of registration of firm² in a suit for setting aside a gift on the ground of coercion and fraud, the new plea that the gift was revocable under Hanafi Law;³ when a sale-deed was attacked in the lower court for want of consideration, a plea that it was not *bona fide*;⁴ in a suit based on defendant's alleged title and fought on the issue of plaintiff's title, the plea of insufficiency of notice to quit;⁵ a plea of improper attestation of a mortgage-deed,⁶ or an objection about execution or registration when opposite party might have adduced evidence if raised in trial court;⁷ a plea of protection under Section 41, Transfer of Property Act⁸ in a suit for release of property attached in execution of a decree against the manager of a family on the ground that it belonged to the plaintiff separately by partition with the judgment-debtor, the new plea, in appeal, that the decree was passed against the manager in his individual capacity and therefore the joint family property could not be attached⁹; the plea that the suit is not maintainable for partial partition;¹⁰ where the defence in the lower court was that a *kabuliyat* was never executed, a plea that it was not enforceable against the appellant¹¹ where the plaintiff based his claim on an alleged gift, a claim in an appeal under an alleged contract,¹²

¹ Nagar *v.* Khase, 86 I. C. 893, 1925 (All.) 440 (2nd Appeal).

² Mohammad Ali *v.* Karji, 1945 (Pat.) 286.

³ Mufid-un-nissa *v.* Yusuf, 101 I. C. 697 (Oudh).

⁴ Pragnarain *v.* Fatima, 147 I. C. 952, 10 O. W. N. 1186.

⁵ Hanumantram *v.* Shankarlal, 95 I. C. 573, 28 Bom. L. R. 513; Bodordoja *v.* Ajijuddin, 57 C. 10; Krishna Prasad *v.* Adyanath, 1944 (Pat.) 77.

⁶ Budh Singh *v.* Jawalnain, 19 I. C. 430 (All.); Raja Venkatra *v.* Kamiseti, 101 I. C. 498 (Mad.).

⁷ Siandra Ara Amina Begum *v.* Hasan Ara, 1935 O. W. M. 871; Chajju *v.* Ghulam, 1939 (Lah.) 459.

⁸ Fakirappa *v.* Rudrappa, 137 I. C. 367, 32 Bom. 255, 34 Bom. L. R. 354.

⁹ Ram Chand *v.* Ramanand, 68 I. C. 227, 3 Lah. L. J. 392.

¹⁰ Thakar Singh *v.* Ujagar Singh, 18 I. C. 583 (Punj.); Nagur *v.* Rankappa, 100 I. C. 202, 1927 (Mad.) 528.

¹¹ Kunji Singh *v.* Raj Kumar Singh, 11 I. C. 940.

¹² Malraju *v.* Venkatadri, 19 A. L. J. 97, 40 M. L. J. 144, 23 Bom. L. R. 713, 59 I. C. 767, 38 C. L. J. 171.

the plea of want of attestation in a gift deed relied upon by the defendant¹, plea that document is inadmissible as not duly proved², a subtenants plea of direct tenancy³ plea of irrevocability of licence.⁴ After dismissal of a mortgage suit against sons for want of legal necessity, a plea for a personal decree;⁵ after dismissal of a suit based on title as donee, the plea of title as heir;⁶ on dismissal of a suit based on heirship, the plea of title in own right independent of heirship⁷ a plea that plaintiff should have sued in a representative capacity;⁸ after dismissal of suit on the ground that there were nearer reversioners than the plaintiff, the plea that under a family custom plaintiff was entitled to share with the nearer reversioner;⁹ when a mortgage is challenged as fraudulent, a prayer in appeal for its redemption;¹⁰ the plea that a copy admitted without objection is inadmissible for lack of proof of loss of the original;¹¹ a plea that a family arrangement was bad for vagueness;¹² in a suit for damages for breach of contract to purchase goods, the plea that the resale by plaintiff was unauthorized,¹³ the question when an agency must be held to have terminated within the meaning of Art. 89, Limitation Act 1908;¹⁴ in a suit for declaration of adoption by a widow alleging permission by the husband dismissed for want of proof of permission, the plea that

¹ *Lalta Prasad v. Nasir Khan*, 56 I. C. 179 (All.)

² A. I. R. 1966 All. 570.

³ 71 C. W. N. 540.

⁴ *Chevaber v. Dharmodayan Co.* A. I. R. 1966 S. C. 1017.

⁵ *Munshi v. Mangat*, 31 I. C. 706 (All.); *Budhan v. Jagannath*, 34 I. C. 757, 3 O. L. J. 214; *Gajadhar v. Ambika*, 41 C. L. J. 450, 1925 (P. C.) 169. (In this case, application for amendment of plaint made before the Privy Council was also refused).

⁶ *Mehran v. Rahimi*, 102 I. C. 426, 28 P. L. R. 181; *Jhumman v. Husain*, 7 O. W. N. 1058, 1931 (Oudh) 7, 129 I. C. 161.

⁷ *Kaladevi v. Khalarai*, 1949 Pat. 124.

⁸ *Guljarkhan v. Husein Khan*, 1937 (Bom.) 476.

⁹ *Mahomad Idris v. Batulan*, 132 I. C. 541, 8 O. W. N. 716.

¹⁰ *Nitya Gopal v. Ramsasi*, 1925 (Cal.) 296, 67 I. C. 394.

¹¹ *Krishnalal v. Mt. Mitzan*, 150 I. C. 240, 1934 (Lah.) 271.

¹² *Manjunatha v. Mukambika*, 1937 M. W. N. 162.

¹³ *Firm Dinanath v. Ramjidas*, 102 I. C. 698, 7 L. L. J. 114, 1927 (Lah.) 249.

¹⁴ *Kinattinkara v. Manavikrama*, 109 I. C. 332, 1928 (Mad.) 906.

adoption was valid as having been assented to by the *Sapindas*;¹ in a case in which the question was whether a transfer was made during the pendency of a suit, the question of active prosecution of suit raised for the first time before the Privy Council;² the plea of invalidity of adoption when in the lower court the fact of adoption alone was contested;³ a plea of forfeiture of tenancy by denial of title not raised in the plaint;⁴ a plea that the ejectment suit was bad for partial ejectment;⁵ where in the lower court defendant pleaded exproprietary rights, a plea of adverse possession;⁶ a plea of statutory charge under S. 55 (6) (b) T. P. Act, where a plea of contractual charge could not be proved⁷ a plea of contributory negligence;⁸ a plea of limitation if it is a mixed question of law and fact.⁹ A plea of *Res judicate* in the same conditions.¹⁰ Where in a suit for possession-defendant pleaded agreement to sell in his favour and the suit was decreed, the plea that defendant was a tenant and entitled to notice to quit;¹¹ where in the lower court defendant had pleaded misrepresentation a plea of mutual mistake;¹² a plea of abatement when it involved a question of fact about the presence of heirs or when the defendant was aware of the presence of widow was not allowed to be raised for the first time in appeal.¹³ An objection that an order of the trial court impleading the respondent as defendant

¹ Ramarao v. Srinivas, 7 Mysore Law Journal 270.

² Parmeshri Din v. Ram Charan, 169 I. C. 657, 1937 (P. C.) 260.

³ Tamanna v. Parappa, 1945 (P. C.) 111.

⁴ Darbar Saheb v. Bare Lal, 162 I. C. 797, 1936 (Pat.) 275.

⁵ Jogendra Nath v. Nistarini Dasi, 1939 (Cal.) 486.

⁶ Paras Ram v. Raj Kumar, 27 A. L. J. 549, 117 I. C. 620, 1929 (All.) 498.

⁷ M. R. R. M. Chettyar Firm v. S. B. M. S. I. Chettyar Firm, 195 I. C. 9, 1941 (P. C.) 47.

⁸ Kali Krishna v. Municipal Board, 1943 (Oudh) 140.

⁹ Banarsi Das v. Kashi Ram, 1963 S. C. 1165.

¹⁰ Kattar Gadda v. Kattar Gadda A. I. R. 1965 Audh. Pr. 177 (F. B.).

¹¹ Kasemali v. Bahajuddin, 1949 Assam 22.

¹² Soorathnath v. Bhabashankar, 33 C. W. N. 626, 119 I. C. 205, 1929 (Cal.) 547.

¹³ Kader Bux v. Salimuddi, 50 C. L. J. 543. Jagannath v. Narayan A. I. R. 1965 Pat. 300.

was wrong;¹ in a suit for specific performance of a contract to sell made by the manager of a joint family contested by a junior member on the plea of want of necessity and other pleas on merits, the plea that he was not a proper party to the suit;² when both master and servant were sued for malicious prosecution as principals, a plea in second appeal that the master was liable for the act of his servant,³ when a party was sued as a surety, the plea that he was a co-obligor;⁴ when defendant unsuccessfully pleaded title by adverse possession in a suit for rent, the plea of irrevocable licence;⁵ when a party's object was to have the question of title decided, a plea of possessory title in second appeal.⁶ A plaintiff whose suit for compensation for acts contrary to a statute is dismissed cannot in appeal get a decree for compensation under the statute.⁷ An objection that execution petition was not maintainable as the petitioner was insolvent at the time was not heard in appeal.⁸ In a suit for damages on the basis of a resale the plaintiff was not allowed to claim damages on the basis of market price.⁹

An exemption from limitation grounds of which were not stated in the plaint as required by O. 7, R. 6, was not allowed to be claimed in second appeal.¹⁰ In a case a decree for partnership debt was passed against partners A and B jointly and was realized from A, A brought a suit against B for the amount paid by him alleging that the debt was of a time prior to his becoming a partner. He

¹ *Daw Aye v. U. Kwe*, 154 I. C. 465, 1935 (Rang.) 23.

² *Madiraju v. Somu*, 125 I. C. 549 (Mad.).

³ *Raghunath v. Moti Ram*, 1933 (Nag.) 299.

⁴ *Vaiyapuri v. Seetharama*, 152 I. C. 464, 1934 M. W. N. 118, 1934 Mad. 659.

⁵ *Puran v. Mansukh*, 126 I. C. 584, 1933 (All.) 632.

⁶ *Budhulal v. Ram Sahai*, 1932 (Oudh) 244, 136 I. C. 808, 9 O. W. N. 553.

⁷ *Prabhu Dayal v. Commissioner of Arrah Municipality*, 1935 (Pat.) 105 (2).

⁸ *Pedda v. Darur*, 1944 (Mad.) 425.

⁹ *Tikam Chand Bhag Chand v. Kakhan Lal Din Dayal*, 1937 (Lah.) 842.

¹⁰ *Girdharilal v. Ranoo*, 1944 (Nag.) 37.

was not allowed in appeal to claim contribution.¹ In a suit for ejectment on the basis of a lease, the defendant did not plead that the lease was for manufacturing purposes and six months' notice was necessary. The H. C. did not object to the new argument. The S. C. observed that this should not have been allowed.²

In a case based on fresh agreement the plaintiff did not allege that his claim was also based on past liability. There was no issue on past liability. Plaintiff was not permitted to raise this new plea in H. C.³

In another case properties were alleged to be private properties. S. C. did not permit the argument that properties were partly trust and partly private.⁴

Ordinarily a point abandoned,⁵ or waived,⁶ by a party at the trial or first appeal, cannot be taken up in appeal, or in second appeal unless it is pure question of law,⁷ such as a question of limitation.⁸ In a mortgage suit the plaintiff alleged that the cause of action arose in 1905. By an amendment he changed this date to 1894 and claimed his suit to be within limitation from the dates of certain payments. The payments were disbelieved and the suit dismissed as barred by time. He was not permitted to urge in appeal that 1905 was the right date of his cause of action.⁹ A mixed

Abandoned
Point

¹ *Meyappa v. Palaniappa*, 1949 Mad. 109, 1947-2 M. L. J. 259.

² *C. Maskerlich v. Stewart & Co.* A. I. R. 1970 S. C. 839.

³ *Kotah Match Factory v. State of Rajasthan* A. I. R. 1970 Raj. 118.

⁴ *Goswami Sri Mahalaxmi Valmji v. Shah Ranchoddas Kali Das* A. I. R. 1970 S. C. 2025.

⁵ *Fakira v. Brij Lal*, 39 I. C. 381, 20 P. L. R. 1917; *Govinda Rao v. Balu*, 16 B. 586; *Sheo Tahal v. Lal Narain*, 124 I. C. 413; *Bargo v. Narain Prasad*, 13 (Luck.) 167, 1937 O. W. N. 229, 176 I. C. 72, 1937 (Oudh) 243, 9 R. O. 361; *Ambika v. Rameshwar*, 1946 (Oudh) 221; *Amarnath v. Sukhna Rai*, 1947 P. 213.

⁶ *Gyan Chandra v. Durga Charan*, 7 C. 318.

⁷ *Napu v. San Bibi*, 1931 (Mad.) 632, 131 I. C. 461.

⁸ *Maung Mya v. Maung Thin*, 94 I. C. 611, 1927 (Rang.) 13, 41 Bur L. J. 113; *Deshraj v. Lachhi Ram*, 1933 Lah. 404; *Ram Charittar v. Suraj*, 1931 A. L. J. 997.

⁹ *Pancham v. Ansar Husain*, 99 I. C. 650, 1926 (P. C.) 88, 24 A. L. J. 731, (1926) M. W. N. 520, 48 A. 45.

question of law and fact cannot be raised, e.g., that junior member of a family are not bound by a decree against the manager.¹ When a point of fact is conceded by the appellant's counsel in the lower court, the second Appellate Court will decline to hear arguments thereon,² but admission by him on a question of law will not preclude his client from urging contrary view in appeal.³ If a respondent in first appeal did not take objection to an adverse finding of the first court, and the decree in his favour was reversed, it was held that he was not precluded from raising the question in second appeal.

Subse-
quent
events

It was held in certain cases⁴ that no subsequent event or devolution of interest can affect the decision of a question as it stood at the time the decree appealed from was pronounced, but it was also held in others that where it could be shown that the original relief has become inappropriate or that it was necessary to give relief to shorten litigation, subsequent events might be taken into consideration.⁵ For example, where plaintiff sued for demolition of a building but was given only a declaration that he was the reversionary heir of a man whose widow was alive and the widow died during the pendency of the appeal, the Appellate Court gave plaintiff a decree for demolition.⁶ In another case, where the suit for ejectment was dismissed under the provisions of the Calcutta Rent Act, but before the hearing of the appeal the Act ceased to operate and its restrictions against ejectment were consequently removed, it was held that the Appellate Court had power to decree ejectment.⁷ In one case the Federal Court altered the decision of the lower court

¹ *Lingan v. Basan*, 51 B. 450 P. C.

² *Kannepalli v. Sri Palahani*, 1945 (Mad.) 256.

³ *Sadashiva v. Govind*, 1945 (Bom.) 351.

⁴ *Bhagwan v. Buta Mal* 102 I. C. 280, (Lah.); *Chhoteylal v. Bansidhar*, 1929 (All.) 699.

⁵ *Mathura Pd. v. Mohd. Umar A. I. R.* 1965 All. 402 other cases See Ch. VIII, under Heading Subsequent Events.

⁶ *Anandamoyee v. Sheeb Chunder*, 2 W. R. P. C. 19.

⁷ *Suresh v. Kanti*, 110 I. C. 715, 1928 (Cal.) 436, 47 C. L. J. 530.

in the light of legislative changes made since that decision.¹ Such supervening events, as may result in creation or extinction of rights by Legislative enactments during the pendency of appeal, have to be taken into consideration in deciding the appeal. The same view has been taken in Madras and Oudh.² The Lahore H. C. has held that no doubt in a sense appeal is continuation of a suit but this is only in a limited sense. It does not, however, mean that the rights which could be pleaded or enforced before a suit was finally adjudicated by the first Court, could be pleaded as of right for the first time in appeal³

The next question is how such grounds of objection should be framed. The following rules, deducible from O. 41, R. 1(2), C. P. C., should be borne in mind in this connection :—

Rules for
drafting
grounds
of appeal

(1) Grounds of objection should be written distinctly and specifically.

(2) They should be written concisely.

(3) They must not be framed in a narrative or argumentative form.

(4) Each distinct objection should be stated in a separate ground and the grounds should be numbered consecutively.

These rules are simple, and important. They must be carefully observed. Any failure to follow these rules may result in an irreparable injury, for, if any memorandum of appeal is not drawn up in accordance with them, the court may reject the appeal,⁴ and may not permit amendment, though it has a discretion to return the memorandum for amendment, if it so chooses.

¹ A. S. Krishna v. M. Sundaram, 1941 (F. C.) 5.

² P. V. P. R. V. R. Veerappa v. V. Ar. V. V. R. Swigami, 1942 (Mad.) 291; Shyam Manohar v. Pt. Anandi, 1943 (Oudh) 271, 206 I. C. 76, 1943 O. W. N. 93.

³ Tahurdin v. Jalaldin, 1944 Lah. 319 (F. B.).

⁴ O. 41, R. 3.

First rule

First Rule : Each ground of attack must be specifically and distinctly stated. No ground of appeal can be permitted in a general or vague form, such as "the judgment of the lower court is contrary to law, facts, and equity." The particular point on which the lower court has erred in law, the particular finding of fact which is wrong, and the particular view taken by the lower court which is opposed to equity, must be clearly and distinctly specified. If any objection is not distinctly and specifically taken, the court may not permit it to be argued, even if the point be a very important one. Such a mistake may prove fatal.

Second rule

Second Rule : The grounds should be drawn up concisely i.e., without any unnecessary details and in brief language. The following ground of appeal will be against this rule : "The plaintiff's witnesses have fully proved that the plaintiff is the legitimate son of Ramnath. The defendant's evidence to the contrary, which attempted to prove that the plaintiff was the son of Ramnath by a concubine, was not reliable, and the lower court has committed a mistake in preferring it to the plaintiff's evidence and has come to a wrong finding that the plaintiff is not the legitimate son of Ramnath." The correct form of taking this objection would be—"Because the finding of the lower court that the plaintiff is not the legitimate son of Ramnath is against the weight of evidence on the record."

Third rule

Third Rule : The grounds of objection should contain no narrative or argument. Most of the grounds of appeal in the mofussil offend against this rule. Facts of the case, or facts constituting an objection should not be narrated, but the objection itself should be distinctly and concisely formulated, and set out in the memorandum. To say that "the defendant had received full consideration for the bond in suit," and that "the defendant's story that he received only Rs. 200 out of Rs. 400 is false," is to narrate facts, and not to set up a ground of objection. If it is intended to challenge the finding of the lower court that the defendant received

only Rs. 200 out of Rs. 400 an account of the consideration of the bond, it should not be done by the two grounds of appeal stated above, but by a distinct objection in the following form : The finding of the lower court that the defendant had received only Rs. 200 out of the consideration of Rs. 400 is against the weight of evidence (or, is not correct), (or, is not supported by the evidence on the record)" or "Because the lower court wrongly placed the burden of proving the passing of full consideration on the appellant," or "Because the defendant has not succeeded in proving that he had received only Rs. 200 as the consideration of the bond."

To refer to the evidence or rulings by which a particular objection is supported or to adduce reasons in support of any objection is to state argument, and, however strong may be the natural temptation to do so, it should never be done, as that is not only contrary to O. 41, R. 1, C. P. C. but is an entire misconception of what is right and proper and a gross misuse of the ground of appeal.¹

The pleaders must not forget that no useful purpose is ever served by such so-called grounds of appeal, as no judge cares to read them.

Fourth Rule : Each distinct objection should be stated separately and only once. The same objection should not be stated in different forms or language at more than one place nor should one objection be covered by another. In other words, the objections should be mutually exclusive, and should in no case, overlap each other. The following grounds of appeal are defective :—

Fourth
Rule

1. "Because the respondent has not proved that he is the owner of the land or that he has been in possession within 12 years.

2. Because the suit was barred by limitation."

Objection No. 1 consists in fact of two objections

¹ Vythilinga v. Sankaralinga, 68 M. L. J. 218.

and objection No. 2 is included in the latter part of objection No. 1.

A slight change would make the grounds of appeal unobjectionable, thus :—

1. Because the respondent has failed to prove his title to the land in suit.

2. Because the respondent has failed to prove his possession within 12 years of the suit, (or because the suit was barred by limitation).

The usual practice is to begin an objection with the word “that” or “because”. Each separate objection should be serially numbered.

Relief

Though it is nowhere expressly provided in the Code that the relief sought by an appeal should be stated in the memorandum of appeal, and though the absence of a prayer for relief does not appear to be fatal, and the court is bound to exercise its powers under Sec. 107, C. P. C. and to give to the appellant such relief as it thinks proper, yet it is the established practice, which is a very proper practice, to mention in the memorandum the relief sought by the appeal. The Allahabad High Court has framed a rule requiring the statement of relief in every memorandum of appeal filed in that court (Chapter IX, R. 7 (g), Rules of the High Court). The valuation of the appeal, on which often depends the court-fee to be paid, depends on the relief sought by the appeal. Besides, the appellant may be only one of several persons against whom a decree has been passed, and may be interested in having only so much of the decree reversed as is against him, or he may relinquish a part of his claim, in which case he will have to pay court-fee on the claim he wants to assert in appeal.¹ It is, therefore, always convenient to specify the relief sought by the plaintiff. The relief would generally be to set aside the decree appealed against, but sometimes this alone may not be sufficient,

¹ *Karamchand v. Jullunder Bank*, 102 I. C. 705, 9 Lah. L. J. 293; *Sah Ramchand v. Pannalal*, 27 A. L. J. 547, 116 I. C. 82, 1929 (All.) 308.

and a further relief may have to be added. For instance in an appeal by a defendant against a decree passed against him, it may be sufficient to say that the decree be set aside, but in an appeal by a plaintiff whose suit has been dismissed it will be necessary to add "and the plaintiff's suit be decreed."¹ It is not, however, necessary to claim the relief with the same precision and details as in plaint.

A memorandum of appeal need not be signed by the appellant himself. It may be signed by him or by his pleader but if there are several appellants and they have no pleader it must be signed by all of them. It is not required to be verified. Signature

Some High Court, by their special rules, require a certificate of counsel filing the appeal. For example, the High Court at Allahabad requires that if, in any second appeal presented by an advocate, attorney or vakil, the ground is taken that there is no evidence or admission to support the decree, the advocate, attorney or vakil shall certify under his hand that he has examined the record and that, in his opinion, such ground is well founded in fact (Chapter IX, R. 9, Rules of the High Court). Such certificates are endorsed at the foot of the memorandum of appeal. Certificate

Any party to a suit adversely affected by a decree can appeal from the decree, but a person whose name does not appear as a party cannot appeal,² nor can a *proforma* defendant from whom plaintiff has derived his title.³ But if a *proforma* defendant's interests with reference to the subject-matter of the suit have been prejudiced, he can appeal.⁴ If the party is dead, his legal representative can prefer an appeal.⁵ If he has been declared insolvent, the receiver can do so.⁶ If he is a minor, his guardian *ad litem* Who may appeal

¹ O. 41, R. 1.

² *Sadhmal Khazanamal v. Debi Chand*, 173 I. C. 505, 1937 (Lah.) 347.

³ *Nirmal Singh v. Zamir Uddin*, 169 I. C. 395, 1937 (All.) 368. 1937 A. W. R. 260.

⁴ *Hafiz Muhammad v. Sarupchand*, 1942 (Cal.) 1.

⁵ Sec. 146 (3).

⁶ *Manoharlal v. Diwan Singh*, 18 I. C. 922.

or next friend in the suit can alone appeal on his behalf and no one else has a right to do so.¹ If the guardian or next friend is dead, the minor can file the appeal through another guardian. If the minor's estate has been taken over by the Court of Wards, the Deputy Commissioner on behalf of the Court of Wards can file the appeal. If the appeal has already been filed by a party and his heir's estate is taken over by Court of Wards, Deputy Commissioner's name can be substituted under S. 151, I. P. C.² Where a *benamidar's* suit was dismissed and he released the property in favour of the real purchaser, the latter can file an appeal.³ Where a decree is against the firm, one of its partners can appeal.⁴ In all such cases when a new person figures as an appellant or as appellant's guardian, there should be a note in the memorandum of appeal alleging the right by which such new person files the appeal, or an application may be attached explaining the matter. An affidavit is also usually filed to substantiate the allegations. In Calcutta High Court the practice is to file a separate application and affidavit is not considered sufficient.⁵ Where an appeal was filed by a *vakil* having power of attorney from the legal representative of a deceased party, but the appeal was filed in the name of the dead person, it was held that there was no proper appeal.⁶ If, for any reason, a person other than the guardian *ad litem* wishes to file an appeal on behalf of a minor he must present with the memorandum of appeal an application to remove the guardian *ad litem* and appoint himself in his place.⁷ In the application, grounds for removal should be

¹ Chedi *v.* Lachmi, 13 A. W. N. 161.

² *In re* Deputy Commissioner, Sultanpur, 1948 Oudh 24 (1), 1947 O. W. N. 58.

³ Sivaswami *v.* Marudaiya, 1939 M. W. N. 962, 50 L. W. 429.

⁴ Mahadeo Firm *v.* Kunjilal, 1939 A. L. J. 1016, 1940 (Al.) 81, 1939 A. W. R. (H. C.) 814, 186 I. C. 811.

⁵ Sanat Kumar *v.* Tarapada, 1948 Cal. 36, 51 C. W. N. 290.

⁶ Surajmal *v.* Raghunath, 117 I. C. 257, 1929 (Nag.) 261.

⁷ Punjaji *v.* Ramanand, 122 I. C. 445, 1930 (Nag.) 177; Latafat Ali Khan *v.* Md. Yar Khan, 124 I. C. 124 I. C. 474, 1930 A. L. J. 771; Raj Behari *v.* Dr. Mahabir Prasad, 1956 A. L. J. 45.

clearly shown, e.g., collusion or negligence. No one who is not a party can file an appeal,¹ but a stranger held by the court as representative of a judgment debtor for the purpose of execution of decree can appeal.² A party cannot file an appeal from a finding, which may be against him, if the decree or the final order in the case is in his favour.³ The adverse finding in such a case will not be *res judicata* against him, hence he need be under no apprehension, but if the facts of a case are so peculiar that such a finding would operate as *res judicata*, it has been held that an appeal from such finding may be permissible.⁴

Where there are several plaintiffs or several defendants and a decree is passed *on a ground common to all such* plaintiffs or defendants, any one of such plaintiffs or defendants, may appeal from the whole decree⁵ and in such an appeal the entire decree can be varied or reversed.⁶ But in such a case all of them will be necessary parties in a Second appeal.⁷ Where one of the appellants dies and the appeal abates against him for failure to bring his heirs on record within limitation most High Courts took the view that O. 41 R. 4 did not permit variation of the decree against the deceased party.⁸ But a contrary view had been held in Madras, Bombay and Calcutta.⁹ The Supreme Court has preferred the former view and held that where

¹ Shah Zahirul Haque *v.* Syed Rashid, 14 Pat. 236.

² Guduri *v.* Devabhaktuni, 1943 (Mad.) 381.

³ Secretary of State *v.* Saminatha, 37 M. 25; Ma Lan *v.* Ma Mya, 179 I. C. 946, 1939 (Rang.) 59.

⁴ Hara Chand *v.* Bhola Nath, 39 C. W. N. 567.

⁵ O. 41, R. 4.

⁶ Ramayan Pd. *v.* Mst Gulab Kuer A. I. R. 1967 Pat. 35.

⁷ Narayan Pillai *v.* Krishna Pillai A. I. R. 1966 Ker. 317.

⁸ Ramphal *v.* Satdeo, 1940 (Pat.) 346, 188 I. C. 743; Aminchand *v.* Baldeo Sahai, 1934 (Lah.) 206, 151 I. C. 784; Baijnath Prasad *v.* Ram Bharose 1953 A. L. J. 330 F. B., Padamram *v.* Surya, 1961 Raj. 72; Nagendra Kumar *v.* Itwari Sahu, 1958 Pat. 329; Raghu Sutar *b.* Narsingh Nath, 1959 Orissa 148.

⁹ Somasunderally Chettiar *v.* Vaithilinga Mudaliar, I. L. R. 40 Mad. 846; Chenchuramaya *v.* Venkata Subayya, 1933 Mad. 655; Shripad Balwant *v.* Nagu Kusheba, I. L. R. 1943 Bom 143; Satulal *v.* Asruddin, I. L. R. 1961 Cal. 879.

originally all the plaintiffs or all the defendants file an appeal against a decree passed on a common ground to all and one or more of the appellants die, and their heirs are not brought on record, Or. 41, R. 4 C. P. C. does not apply at all and the remaining appellants cannot get advantage of that provision.¹ It is not permissible under O. 40, R. 4 C. P. C. for one only of the several plaintiffs in a suit under Sec. 92, C. P. C. to prefer an appeal, as all the persons to whom permission has been granted can sue or appeal only jointly and they cannot be regarded as several plaintiffs,² but one of several joint owners who were plaintiffs may file an appeal.³ A person who has adopted an order of the court and acted under it cannot after he has enjoyed a benefit under it appeal from it, e.g., a party accepting costs of an amendment,⁴ or costs awarded on restoration of a suit,⁵ cannot appeal from the amendment or restoration, but withdrawal of pre-emption money from court by the vendee does not deprive him of his right to appeal from the pre-emption decree,⁶ nor does paying and satisfying the decree appealed from,⁷ nor does filing a plaint in another court debar a plaintiff from appealing against the order of its return.⁸ But if the benefit received by him was not conferred under the decree, he is not debarred from appealing, e.g., a defendant against whom a decree declaring his election as invalid has been passed can file an appeal even though he has afterwards been nominated by the government as a member.⁹

¹ Rameshwar Prasad *v.* Syam Behari Lal Jagannath, 1964 A. I. J. 109 (S. C.).

² Muhammad Ishaq *v.* Muhammad Husain Khan, 100 I. C. 838; Mohsham Ali Khan *v.* Muloo, 24 A. 694 I. C. 347; Dharm Singh *v.* Bakshi, 92 I. C. 315.

³ Shripad Balvant *v.* Nagu, 1943 (Bom.) 301.

⁴ Sohanlal *v.* Dharimal, 109 I. C. 819, 1928 (Lah.) 813.

⁵ Poduri *v.* Mohammad Azam, 110 I. C. 528 (Mad); Gadde Benkata-rayudu *v.* Anumolu Chinna, 58 M. L. J. 137.

⁶ Mehdi. *v.* Nadran, 111 I. C. 814, 1929 (Lah.) 137.

⁷ Ishar Das-Dharam Chand *v.* Buta Mal-Durga Das, 115 I. C. 67, 1929 (Lah.) 42.

⁸ Ramchandra *v.* Mohan Lal, 121 I. C. 668 (Nag.).

⁹ Gopeschandra *v.* Benode, 165 I. C. 606 (2), 1936 (Cal.) 424.

It is not necessary that all the parties to the decree should be made parties to the appeal. The appellant must make respondents to his appeal all those persons who would be affected by the success of his appeal. He is at liberty to confine his appeal to one out of several persons who would ordinarily be affected, and in that case, he may implead only that person.¹ For instance, A sues B and C for money due on a bond, and the suit is dismissed. In appeal, if A prays for a decree against B alone, he need not make C a respondent to the appeal. But if A and B obtain a joint decree against C, and C appeals, he must make both A and B respondents. If a plaintiff obtains a joint decree against several persons, he cannot file an appeal against some only, so long as the decree against others remains final and operative.² If several plaintiffs sued for ejectment and the suit was dismissed, one of them can appeal.³ Similarly, if a joint declaratory decree has been passed in favour of several plaintiffs it is not competent to the defendant to prefer an appeal impleading only one of such decree-holders as respondent.⁴ The Supreme Court has held that if there is a joint decree against several persons and if an appeal is filed by the defendant and one of the respondent decree holders dies and his heirs are not brought on record, the whole appeal abates as it is not possible to proceed with it in the absence of the deceased D. H.⁵ If any party affected by the result of the appeal is dead, his legal representatives can be impleaded as respondents and the facts may be mentioned in the memorandum of appeal or in a separate application. If he is a minor, or if the guardian of a minor respondent has died before appeal, an application should be made for appoint-

Who
should be
added as
a respon-
dent

¹ *Narain Das v. Sheodin*, 1926 (All.) 234, 24 A. L. J. 300; *Madhusudan v. Satish Chandra*, 1926 (Cal.) 512, 91 I. C. 620.

² *Kamla Prasad v. Chandra Nath*, 106 I. C. 300 (Cal.); *Dwarika v. Krishna*, 144 I. C. 814, 1933 (Cal.) 464, 37 C. W. N. 84.

³ *Ranbir v. Bataiya*, 1962 A. L. J. 868.

⁴ *Feroze v. Secretary of State*, 1928 (Lah.) 947, 111 I. C. 692; *Ramdas v. Ram Anuplal*, 1949 Pat. 90.

⁵ *State of Punjab v. Nathu Ram*, 1962 S. C. 89.

ment of a guardian or a new guardian. Such application should be made as in a suit. In case the legal representatives are not impleaded, if the appeal is of such a nature that it can proceed without them, e.g., when the interest of the deceased was separate and defined¹ if the court passes a decree after hearing the appeal on merits the decree will not be invalid.² If decree cannot be passed without them, e.g., in a partition suit³ when the deceased was one of the plaintiffs, in a suit for specific performance of a contract,⁴ or when the suit is for accounts and partition of partnership property⁵ the entire suit will abate. In a case where several persons had trespassed on the plaintiffs land and he sued for possession but one of the trespassers died before the decree without his heirs being brought on record the Allahabad High Court, differing from the Nagpur High Court held that the suit against the other defendants remained unaffected and would proceed.⁶ It is, however, submitted that it was overlooked that all the defendants were in joint possession even though there was no allegation that they had acted jointly or in concert. The decree passed against the other defendants can easily be defeated by the heir of deceased defendant on the ground of joint possession of the entire land. If some of the heirs are added it was held that they represented all.⁷ The Patna High Court has held that this is so only if the mistake is bonafide, because of ignorance of all the heirs.⁸

If the decree is based on a ground common to all the

¹ *Mt. Jainath v. Danpal Singh*, 1947 Oudh 164.

² *Mohammad Naina v. Muhammad Hehiya*, 1933 (Mad.) 218, 145 I. C. 765.

³ *Malobai v. Gaus Md.* 1949 Nag. 91; *Pulla Maddulei v. Rahiman*, 1949 Mad. 199, 1947-2 M. L. J. 587, 1947 M. W. N. 542; *Udairaj v. Bijaipal*, 1962 A. L. J. 282.

⁴ *Aziz Khan v. Bhola Nath*, 1945 (All.) 21.

⁵ *Kunjbiharilal v. Ayodhya Prasad*, 1947 Oudh 17.

⁶ *Raja Himanshudher Singh v. Ram Hitkari*, 1963 All. 496.

⁷ *Dhondu v. Waman*, 1945 (Bom.) 126; See however, *Padamaram v. Surja*, 1961 Raj; 72.

⁸ *Barmeshwar Pd. v. Baba Kuer Raj*, 1964 Pat. 116.

appeallants the appeal does not abate on the death of one of them.¹ In a suit against a firm to which partners were also impleaded it was held that it was not necessary to implead legal representatives of a deceased partner as O. 30, R. 4 applies to appeal also.² If a decree-holder respondent assigns the decree to a third person, it is not necessary to implead the latter. It is for him to apply to be brought on the record and if he does not and leaves the case to be defended by the original decree-holder he will be bound by the decree.³

If a decree proceeds on a ground common to all the plaintiffs or all the defendants, it is open to any one of such plaintiffs or defendants to appeal from the whole decree (O. 41, R. 4, C. P. C.). The question whether in such cases, it is necessary to join the remaining plaintiffs or defendants as *pro forma* respondents is one on which there is divergence of judicial opinion. In some cases the view has been taken that this is necessary.⁴ But most cases take the opposite view that the decree can be passed without their being parties.⁵ The better opinion, it is submitted, is that it is not necessary to join the other plaintiffs or defendants as respondents as O. 41, R. 4, C. P. C. clearly empowers a court to pass an effectual decree on the appeal of one of the plaintiffs or defendants only. It has been held that in such cases the *pro forma* defendants can be impleaded under O. 41, R. 20, C. P. C. even after limitation.⁶ But in view of the conflicting opinions it would be advisable from the pleader's point of view to take no risks and to implead the remaining plaintiffs or defendants, as the case may be, as *pro forma* respondents.

¹ Narain Fande *v.* Gayarai, 1938 (Fat.) 147, 174 I. C. 388.

² Savalaram *v.* Himatlal, 1944 (Bom.) 350.

³ Banke Behari *v.* Raghubalar, 1930 A. L. J. 1034.

⁴ Somkhan *v.* Jan Mohd A. I. R. 1928 Lahore 43 Balkaran *v.* Malik Namdar A. I. R. 1924 Allahabad 873, Nanak *v.* Ahmad Ali A. I. R. 1946 Lahore 399.

⁵ Ranbir Singh *v.* Bataiya A. I. R. 1963 All. 79, Anant Lal *v.* Debi Prasad A. I. R. 1959 Patna 258 Brijmohan Lal *v.* Rajkishore A. I. R. 1959 Punj. 1417 Narsingh Das *v.* Bhairon Das A. I. R. 1961 Raj 81.

⁶ Abrar Husain *v.* Ahmad Raza, 167 I. C. 405, 1937 (All.) 82 (S. B.).

The mere fact that any party is not before the court will not, however, prevent the court from doing full justice in the case, and from passing any order it thinks equitable and just. Where in a suit by A and B against C for ejectment, the court passed a decree refusing the ejectment on the basis of a compromise and A alone appealed on the ground that compromise was not legal as court's permission had not been obtained and the court held that this contention was right, it was held that the decree must be set aside both in favour of A as well as B.¹ But no order can be passed against a person who is not a party to the appeal and who is not on the record.² If the order the court proposes to pass is likely to affect any party to a decree who is not a party to the appeal, such party if "interested in the result of the appeal" the court can implead him under O. 41, R. 20, or under its inherent powers. This can be done in second appeal even if the party was not impleaded in first appeal.³ The court has inherent power under S. 151, C. P. C. even to implead the legal representatives of a respondent who had been dead before the appeal was filed.⁴ But it has been held that a party against whom a suit has been dismissed and against whom a right of appeal has become time barred is not interested in the appeal and should not be impleaded,⁵ nor one of the two persons in whose favour the decree appealed against was passed.⁶ In the case of *Labhu Ram v. Ram Pratap* all the case law on the point has been fully and carefully reviewed. In a case for partition the appellant failed to implead the heirs of a co-sharer who had died after

¹ *Ramrup v. Kalapnath*, 1948 All. 33.

² *Chatumal Rangjhomal v. Abdul Hameed Khan*, 173 I. C. 862, 1937 (Sind) 312.

³ *Kishanlal v. Kanhaya Lal*, 1938 B. M. L. J. 91.

⁴ *Alabhai v. Bhura*, 171 I. C. 536, 1937 (Bom.) 401.

⁵ *Chokalingam v. Shathai*, 1927 (P. C.) 252, 107 I. C. 237, 6 Rang. 29; *Thadhi v. Abdul Hussain*, 31 S. L. R. 468; *Rakka v. Arulayi*, 169 I. C. 318, 1937 (Mad.) 228; *Alabhai v. Bhura Bhaya*, 171 I. C. 536, 1937 Bom. 401; *Teja Singh v. Kartar Kaur*, 1937 (Lah.) 180; *Bisambhar Deo v. Hit Narayan*, 160 I. C. 976, 1936 (Pat.) 49.

⁶ *Attar Singh v. Debi Sahai*, 169 I. C. 186, 1937 (All.) 243; *Labhu Ram v. Ram Pratap*, 1944 (Lah.) 76, 213 P. C. 278.

the decree, and the High Court held that if the decree was found to be bad, then in order to avoid the anomaly of the continuance of the decree against them, they should be added.¹ In a suit, by B against C and D, a decree was passed against D who appealed without impleading C. B also did not file an appeal against C, still his application to implead C as respondent was allowed.² If a party is not impleaded and the omission is due to an oversight, and the party was not a contesting party in the suit, the court may exercise its powers under O. 41, R. 20, C. P. C. and implead the omitted party,³ but it cannot implead a person against whom the appeal has abated.⁴ A person who was party to the suit but was not impleaded in appeal, may be impleaded by the court even after limitation for the appeal has expired,⁵ but the Lahore High Court has held that this should not ordinarily be done,⁶ though where the omission was due to a clerical mistake in the copy of the decree, the same court added the omitted party after limitation.⁷ The Oudh Chief Court was against the impleading of a party against whom the right of appeal had become barred by limitation.⁸ If however, the respondent to be added is only a *pro forma* respondent who is supporting the appellant, there can be no objection to his being added even after the period of limitation.⁹ The appellate court can transpose parties if ends of justice require it even after limitation.¹⁰

A person desiring to file an appeal as a pauper must present an application for being allowed to do so.¹¹ The

Pauper
Appeal

¹ Beas Singh v. Baldeo, 109 I. C. 609, 1928 (Pat.) 343, 7 Pat. 510.

² Kannusami v. Rabiath-Ammal, 1933 Mad. 806, 65 M. L. J. 548.

³ Jalaldin v. Karim Baksh, 11 L. L. J. 523, 1930 (Lah.) 295.

⁴ S. Krishnaswami v. Sankarappa, 1935 (Mad.) 175, 1935 (M. W. N. 398, 41 L. W. 111; Suraj Prakash v. Sant Lal, 1940 (Pat.) 137.

⁵ Suraj Prakash v. Santlal, 1940 (Pat.) 137.

⁶ Hayat v. Mutali, 175 I. C. 819, 1938 (Lah.) 35, 40 P. L. R. 273, 10 R. L. 67, Shangara v. Imam Din, 1940 (Lah.) 314, 1935 I. C. 332.

⁷ Shantilal v. Hiralal, 1941 (Lah.) 402.

⁸ Rameshwar v. Ajodhia, 195 I. C. 761, 1941 (Oudh) 580.

⁹ Ramrattan v. Fazal Haq, 1939 (Lah.) 346.

¹⁰ Bhubneshwar Prasad v. Sidheswar, 1949 Pat. 309.

¹¹ O. 44, R. I.

application should show that he is not possessed of sufficient means to enable him to pay the court-fee on the memorandum of appeal and should, for this purpose, contain a schedule of all movable or immovable property belonging to the applicant, with the estimated value thereof. A pauper application can be allowed to be amended in the same way as a memo of appeal.¹ The application should be accompanied by the memorandum of appeal written on plain paper, and copies of the judgment and decree required under the rules to be filed with an appeal.² It should be presented to the court by the applicant in person. Such applications are governed by the same provisions as applications to sue as pauper, and must, therefore, be duly signed and verified. A defect or omission in verification can be allowed to be corrected.³ A pauper appeal cannot be filed on any ground except that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust,⁴ but it cannot be rejected on this ground after an order for issue of notice to the respondent and the District Govt. Counsel has been issued.⁵ Full Benches of Allahabad, Oudh and Calcutta have, however, taken a different view.⁶ If the applicant had been allowed to sue as a pauper in the lower court, that fact should be mentioned in the application.⁷ Pauper appeals differ from pauper suits in this important respect that while, in the latter, there is only one document, the petition, and if it is dismissed, the applicant has to bring

¹ *Bihari Sahu v. Sudama Kuer*, 1938 (Pat.) 209, 175 I. C. 505, 10 R. P. 632.

² *Rajammal v. Parthasarathi*, 165 I. C. 471, 1936 (Mad.) 600.

³ *Bisan Lal v. Kisan*, 169 I. C. 894, 1937 (Nag.) 108.

⁴ O. 44, R. 1.

⁵ *Raghunath v. Rampiari*, 6 (Pat.) 687, 1928 (Pat.) 118, 109 I. C. 645; *Krishna Bhatta v. Ananta Bhatta*, 1961 Ker. 309. *Soma Sundaran v. Amnachelam A. I. R.* 1932 Madras 523.

⁶ *Mst. Powdhari v. Mst. Ram Sanwari*, 1934 All. 1004 F. B.; *Hubshi v. Mehdi*, 166 I. C. 284, 1937 (Oudh) 222 (F. B.); *Shib Krishna Das v. Panchanan Ganguly*, 1961 Cal. 346, F. B.

⁷ *Subodh Chandra v. K. C. Bank Ltd.*, 1941 Cal. 659; *Girwarlal v. Lakshminarain*, 26 All. 329; *Vishwanatham, v. Satyanandam*, 1937 Mad. 161; *T. C. State v. John Mathews*, 1955 Tr-Co. 209 F. B.

a separate suit on payment of court fee in the case of appeal there are two separate documents, viz., the petition and the memorandum of appeal, so that if the petition is rejected, the memorandum is still pending and it can be entertained under Sec. 149 on the applicant paying the necessary court-fee. The court may reject the application but in respect of appeal itself grant time for payment of court-fees and reject the appeal on non-payment. There can be no pauper appeal to the Privy Council,¹ or under the Letters Patent.²

Under Art. 130 of Lim. Act 1963 the period of limitation for such applications is only 30 days,³ for appeals to other courts and 60 days for the High Court. Irrespective of the fact that the limitation for the regular appeal may be longer. However, time for obtaining copy of judgment can be excluded.⁴

Where there has been one trial, one finding and one decision there need not be two appeals even though two decrees were drawn up,⁵ but Orissa has taken a different view.⁶ A Full Bench of Allahabad High Court has taken the view that if two suits involving common issues have been decided simultaneously, appeals must be filed in respect of both, because if the decision on the common issues in one suit becomes final and the other essentials of section 11 C. P. C. are present, it will operate as *res judicata* in the other appeal.⁷

A respondent's cross-objection under O. 41, R. 22, C. P. C. should be drawn up in the same form as a memorandum of appeal, except that instead of the appeal it shall be headed the cross-objection, but the cause-title of the cross-objection shall be the same as that of the appeal, thus :—

¹ Mathradas v. Mokhan Singh, 161 I. C. 192 (1), 1936 (Pesh.) 36.

² Chhattroo Devi v. Ram Sarup, 1964 A. L. J. 283.

³ Art. 170, Limitation Act.

⁴ A. I. R. 1964 Ker 173 (F. B.).

⁵ Narhari v. Shankar, 1953 S. C. 419.

⁶ Sumi Devi v. Pran Krishna, 1956 Orissa 68.

⁷ Bhagwan Sahai v. Durga Kuer, 1963 All. 210 F. B.

“A. B., etc.

Appellant

versus

C. D.

Respondent

Cross-objection under O. 41, R. 22, C. P. C. on behalf of C D. respondent, to a portion of the decree appealed from.

Grounds of Objection :—

OR

“C.D., the above named respondent takes a cross-objection under O. 41, R. 22, C. P. C to a part of the decree appealed from in this case, and sets forth the following grounds of objection to the said part of the decree, viz.—”

A cross-objection can be filed within one month of the service of notice of the hearing of appeal. If a notice is first issued informing the respondent of the filing of appeal and calling upon him to enter appearance and afterwards another notice of hearing is issued, limitation is reckoned from the service of the latter.¹ The respondent should state in the petition of objection the date on which such notice has been served upon him. If the objection is filed beyond one month, an application should be made stating the reasons of delay and praying for permission to allow the objection to be filed. A cross-objection can be filed even before the service of notice.² When both parties file appeals against a decree and the appeal of one cannot be entertained as it is barred by limitation, it may be treated as a cross-objection to the other appeal.³ A contrary view has been taken in Peshawar,⁴ on the ground that when an appeal is time barred the court is bound to dismiss it under S. 3 of the Limitation Act and cannot consider it by treating it as a revision.

If the respondent has privately served copies of his

¹ *Lalta Baksh v. Phoolchand*, 1939 Oudh W. N. 530.

² *Labhu Ram v. Ram Pratap*, 1944 (Lah.) 76, 213 I. C. 278; *Dasrual v. Narayan*, 1937 (Nag.) 105, 170 I. C. 93.

³ *Balkishna v. Mt. Javri*, 1939 M. L. R. 746.

⁴ *Mohd. Sarwar Khan v. Ghafoor Beg*, 1944 (Pesh.) 7.

cross-objection on the parties affected by it, written acknowledgments of such parties should be filed with the cross-objection.

The various High Courts were not agreed as to whether cross-objection can be filed against a co-respondent. The Supreme Court considered the question¹ and held that O. 41, R. 33, was wide enough to empower the appellate court to give relief not only as between the appellant and the respondent, but also between respondent and respondent. It also held that as a general rule a respondent can prefer a cross-objection against the appellant only. In exceptional cases, however, such as where the relief sought against the appellant is intermixed with relief granted to the other respondents so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, a cross-objection can be directed against other respondents also. A cross-objection cannot be directed against a person who, though a party to the decree is not a party to the appeal,² nor can the court implead such person as a party to the appeal for the purpose of hearing such cross-objection.³ If both parties appeal against the decree of the trial court and, both appeals being dismissed, the plaintiff alone prefers a second appeal from the decree passed on his appeal and the defendant does not prefer any appeal from the decree passed on his appeal, the defendant cannot file a cross-objection so as to attack the decree of the first appellate court passed on *his* appeal, as a cross-objection can be directed only against the decree against which the appeal has been preferred.⁴

¹ Pannalal *v.* State of Bombay, 1963 S. C. 1516; Gopal *v.* Meena-Kshi, 1941 (Mad.) 402; but see *Contra Vadlamudi v. Ravipati*, 1950 Mad, 379 (F. B.).

² Paratap Chand *v.* Chunilal, 1940 (All.) 225, 188 I. C. 396, 1940 A. L. J. 161.

³ Rajendra *v.* Moheshata, 1926 (Cal.) 553, 91 I. C. 649.

⁴ Debi Chand *v.* Parbhulal, 24 A. L. J. 694; *contra*, Hardhan *v.* Gokhul, 1924 (Pat.) 775.

A cross-objection should be valued as an appeal and court-fee should be paid accordingly. There is no provision in the Code regarding a respondent being allowed to file a cross-objection without court-fee on the ground that he is a pauper. But the Nagpur High Court has held that a pauper respondent can file a cross-objection without court-fee.¹ If an appeal is withdrawn or dismissed for default, the cross-objection does not fail but must be determined,² but if it is rejected for non-payment of court-fees, the cross-objection fails.³

In a cross-objection the respondent can take such objection as he could have taken by way of a separate appeal.⁴ If he had no right to prefer an appeal, he cannot file a cross-objection even. For instance defendant takes a plea in his written statement that the court fee paid by the plaintiff is deficient by Rs. 1,000. Court holds that deficiency amounts to Rs. 70/- only. Plaintiff has a right of appeal against this decision under Section 6(A) of the Court Fees Act. But the defendant has no right to file an appeal and to contend that deficiency amounts to Rs. 1,000 and not to Rs. 70/- only. Therefore, he cannot raise this point by way of cross-objection in plaintiff's appeal.⁵

Allahabad and Calcutta High Courts have held that no cross-objection can be filed in a Letters Patent (now known as Special appeal).⁶

¹ *Narayan v. Hiralal*, 144 I. C. 217, 1933 (Nag.) 158.

² O. 41, R. 22 (4) C. P. C.

³ *Kashiram v. Ranglal*, 1941 (Bom.) 242, 195 I. C. 894; *G. P. Mehra v. Smt. K. K. Mehra*, 1959 A. L. J. 201.

⁴ O. 41, R. 22, C. P. C.

⁵ *Mst. Kulsumunnissa v. Mst. Khursandei Begum*, 1953 A. L. J. 702.

⁶ *Mst. Daropadi Devi v. S. L. Dutt*, 1957 All. 48, *Chhabboo Devi v. Ram Sarup*, 1964 A. L. J. 283. *Brojendra v. Prosanna* 59 I. C. 489.

CHAPTER XVIII

Applications Petitions

Applications are a necessary evil of civil litigation. They have to be made generally, either to get some defect removed or to bring more facts on record or to clarify certain ambiguities or to seek some interim relief or because the law requires such applications to be made. Petitions are in the nature of formal applications for seeking a remedy provided by law. They may be classified into :—

Applica-
tions &
their
nature

- (1) Applications under the provisions of the code
- (2) Petitions under other Statutes.
- (3) Petitions under the Constitution.

The general rule of drafting in respect of all the applications is, that they should contain all the particulars required to be alleged by law giving the material facts in support of them. They should be precise as well as concise and should not contain any irrelevant matter. They should be drafted after looking into the provisions of law so that no detail is omitted. In cases where the law does not specify any particulars the counsel should first find out from the law or the rules what facts, he is required to establish, in order to entitle his client to the relief claimed, and then make up his mind what facts to assert and what to omit. As far as possible the grounds on which the application is based should be stated in the words of law or the rule under which the application is made. It will not be advisable to use a different language or substitute words for the language or words used in any provision, though the meaning may be the same. A few applications are also required to be verified or supported by an affidavit or both and so no mistake in this behalf should be committed. Some High Courts have made rules and in some High Courts there is the practice

Drafting
&
contents
of
applica-
tions

requiring verification of all the applications, as in Calcutta H. C. and so verification should not be omitted in applications made to such H. Cs.

Their
Form

Every application should contain the name of the Court, the no. and cause title of the suit or the Proceedings, followed by the names of applicant and apposite party and the provision of law under which it is made.

Applications under C. P. C.

Applications under the code have to be made from stage to stage in a case of civil nature, viz. along with the plaint if there is a minor deft, an application for appointment of a guardian ad litem supported by an affidavit has to be made. If an interim relief is sought, such as the issue of an interim injunction or attachment before judgement, or the appointment of a receiver, again an application supported by an affidavit has to be made. The deft if he desires to contest such an application, as he generally does, has to file a reply controverting plffs. allegations supported by a counter-affidavit. There may be other applications such as for a appointment of a commission, or for serving interrogatories, or discovery and inspection. During the pendency of an appeal or a suit there may be an application for reference, which is rare in civil cases but more frequent in sales Tax and Income Tax cases.

Applica-
tions in
execution

After a decree is put into execution, a variety of applications, depending upon the mode of execution by which satisfaction of decree is sought, have to be made by the D. H. The J. D. too, may file objections under S. 47 or under some rule of O. XXI C. P. C. as may be necessary. They are all to be made through applications. Even a third party may do so. The forms of some important applications with relevant law in the foot notes have been given in the precedents, and they may be looked into. However, the applications given by way of Reference, Review or Revision, which provide remedy to the aggrieved party are separately dealt below.

Reference

The provision for reference has been made in S. 113 and O. XLVI C. P. C. It may be made *Suo Moto* or on the application of any of the parties, but the conditions are :—

Provision
of Law

(a) there must be a suit or appeal pending in which the decree is not subject to appeal or further appeal or

(b) a pending execution of such a decree and

(c) a question of law arises in such suit, appeal, or execution which is of doubtful nature and the court concerned entertains a reasonable doubt;

The court, in such a case, may draw up a statement of the facts of the case and the law point on which doubt is entertained and after recording its opinion make a reference to the H. C.

The object of this provision is to bring before the H. C. difficult questions of law direct from the lower court, otherwise than through the regular channel of appeal. This helps in the speedy disposal of cases and saves parties from protracted trial, as the court making the reference has to dispose of the case according to the judgement of the H. C.

Object of
a re-
ference

The party who makes a prayer to the court for reference must state in the application the facts of the case as well as the question of law which arises in the case, quoting the authorities for and against the point which makes the question of a doubtful nature. The law point should be such on which two equally good views are possible. A reference cannot be made on hypothetical questions of law.¹

Reference
on a
party's
request

If there is good case for reference, it is equally improper to turn down the request of a party.² That was a case under S. 4 of Public Premises (Eviction of Unauthorised Occupants) Act 1958. Before the appellate Court an application for reference was made stating that validity of Ss. 4, 5 and 7 was in question and so a reference under S. 113 be made

¹ District Munsif Chittor, A. I. R. 1970 A. P. 365.

² M. S. Oberoi v. The Union of India A. I. R. 1970 Punj. 407.

to the H. C. The D. J. declined to make a reference and decided the appeal. In an application under Art. 227 of the constitution the H. C. held that the D. J. exceeded his jurisdiction in refusing to make a reference.

Review.

Provisions
of law &
grounds

As provided in S. 114 and O. XLVII C. P. C. the remedy of review is also available in a limited manner. Any person who considers himself aggrieved (a) by a decree or order from which an appeal lies but no appeal has been filed, or by a decree or order from which no appeal is allowed or by a decision on a reference from a court of Small Causes, may make an application for review of the judgment to the court which passed the decree or order on any of the following grounds :—

(i) the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made or

(ii) some mistake or error apparent on the face of the record or

(iii) any other sufficient reason.

Effect of
Appeal on
Review

There have been cases in which after filing an application for review, an appeal has also been preferred. If the appeal is withdrawn, it will be deemed as if no appeal had been filed and the application can proceed but if the appeal has been heard and decided the appellate decision will prevail, and the application for review will fail.

First
ground
for Review

The first ground relating to discovery of new and important matter or evidence will depend upon the facts and circumstances of each case. However, this new and important matter should be such as if produced at the appropriate time might have changed the decision, and it should have existed at the time of hearing of the case. A judgement based upon a ruling which was subsequently

over-ruled cannot be reviewed.¹ Similarly if a ruling has not been brought to the notice of the judge, it also cannot form a ground for review.² A subsequent change in Legislative enactment is also not a good ground.³ In the case of *Babadur v. Bachai* A. I. R. 1963 All. 186 a second appeal was decided in ignorance of a notification staying the appeal. The application for review was held to be not maintainable though the mistake was rectified under H. Cs. inherent jurisdiction.

The second alternative ground is some mistake or error apparent on the face of record. This will include cases of error both of fact and law. What is an apparent error may differ from case to case or from one judge to another. The test should be that no error would be apparent unless it was self evident. It should not require any examination or argument to establish it.⁴ In the expression "error apparent on the face of it" the emphasis is on the word "Apparent" and not the word "error".⁵ The error should be such as can be found out from the record. A mere failure to interpret the law correctly is not an error apparent on the face of record. If there is such an error the review petition must be allowed. It is besides the point how the error crept in.⁶ In a recent Bombay case the State claimed privilege in respect of certain documents. This objection was disallowed before the stage of evidence. This decision was held to be open to review.⁷

Second
ground

The third alternative ground for entertaining review is "For any other sufficient reason". These words are of very wide import and there was a great divergence in the opinions of the different H. Cs. till the P. C. held that the

Third
ground

¹ *Amrit Lal v. Madho Das* I. L. R. 6 All. 292.

² *Abdul Sadiq v. Abdul Aziz* I. L. R. 21 All. 152.

³ *Gyanji v. Ningappa* A. I. R. 1928 Bom. 308.

⁴ *Bataik K. Vyas v. Surat Borough Municipality* A. I. R. 1953 Bom. 133.

⁵ *Registrar University v. Dr. Ishwari Prasad* A. I. R. 1956 All. 603.

⁶ *Jamuna Kuer v. Lal Bahadur* A. I. R. 1950 F. C. 131.

⁷ *State of Maharashtra v. S. B. Mahajani* A. I. R. 1970 Bom. 306.

said expression means on grounds 'at least analogous to those specified immediately previously'.¹ This view has been adopted both by the F. C.² and the S. C.³

The word analogous used by the P. C. has also been a subject of different interpretation by different H. Cs. That is whether it means *Ejusdem Generis* or has a wider meaning. These cases need not be referred to as the ultimate result is that every court has come to the conclusion that the reason given must appear to be sufficient to the court though the sufficiency or otherwise of the reason may depend upon the facts and circumstances of each case.⁴

The Court in granting review has to exercise due care and scrutinise the allegations because a party should not be allowed to reopen trial without sufficient reason. The court should see that the intention behind the application is not to fill in the gaps, or patch up weak points or raise a new point of law or a new argument or raise a point which had been given up.

Like a right to appeal, a right to review can only be exercised under some statute or rules having the force of statute. The Court or any judicial or quasi-judicial authority cannot exercise such a right on the basis of inherent power.

Revision.

General

The High Court can exercise power of revision *Suo Motu* or on the application of an aggrieved person under S. 115 of the Code. It can also exercise under Art. 227 of the Constitution, power of superintendence over all courts and Tribunals within its territorial jurisdiction, but the power is both of a judicial and administrative nature. Art. 226

¹ Chajju Ram *v.* Neki A. I. R. 1922 P. C. 112.

² Hari Shanker *v.* Anath Nath A. I. R. 1949 F. C. 106.

³ M. M. B. Catholicos *v.* Athanisuis A. I. R. 1954 S. C. 526 (at 538.)

⁴ I. L. R. 1961 All. 399 (F. B.); Shivdeo Singh *v.* State of Punjab 1963 S. C. 1909 and Manohar Lal Varma *v.* State of M. P. A. I. R. 1970 M. P. 131.

may not specifically relate to the revisional power of the H. C. but it does give the Court, a power of judicial interference with orders passed in judicial or quasi-judicial proceedings. Under this Article the H. C. may quash an order which has been passed without jurisdiction or in excess of jurisdiction on the ground of an apparent mistake or error.

The power of revision under S. 115 and Art. 227 are quite distinct. The scope of power under S. 115 is limited and the power can only be exercised when the conditions given therein are fulfilled while the power under Art. 227 is unlimited and extends to tribunals as well and also in administrative matters. However, under both the provisions the powers are discretionary and it is for the H. C. to see whether the facts and circumstances of a particular case call for any interference and whether such interference will cause in justice to any person.¹ In fact the H. C. will always be reluctant to exercise such power unless it is satisfied that it is necessary so to do in the interest of justice. It may be noted that any person invoking such power or calling for H. C.'s interference must come with clean hands and place before the H. C. all the essential facts and correctly too.

Powers
u/s. 115
Art. 227-
Their
compari-
son

The H. C. can entertain a revision under S. 115 of the Code of Civil Procedure if :—

Power
under S.
115 of the
code

- (a) a case has been decided by a court
 - (b) the court is subordinate to the H. C. and
 - (c) the decision is such from which no appeal lies.
- It is further necessary for the H. C. to satisfy itself before interfering that the subordinate court :—

- (i) has exercised jurisdiction not vested in it, or
- (ii) has failed to exercise jurisdiction so vested in it,
or
- (iii) has acted in the exercise of its jurisdiction illegally or with material irregularity.

¹ Sita Ram v. Kedar Nath A. L. J. 1957 All. 825.

What is
illegality
and
material
irregula-
rity

It would appear that there are three conditions for entertaining an application for revision as given in the first part of the section. If these conditions are satisfied the H. C. may interfere with the orders of the subordinate court on any one of the three alternative grounds given in the second part. The first two grounds are too obvious to require any comments. So far as the third ground goes, the court would be deemed to have acted illegally if it has committed a breach of any provision of law. While some error of procedure during the trial of the case would not amount to illegality and would be a mere irregularity, it would be material irregularity if it would have affected the ultimate decision.¹ This view was adopted by the Supreme Court² and was also later on approved.³ This settles a lot of controversy which was prevailing in the views of the different High Courts in India as to the interpretation of the phrase "To have acted in the exercise of its jurisdiction illegally or with material irregularity." A mere wrong decision on question of fact or law does not call for interference unless the lower court acted illegally and with material irregularity.⁴

In view of the above authoritative pronouncement no useful purpose will be served by referring to the earlier cases, except the case of *Narayan Sonaji v. Shesrao Vithoba* A. I. R., 1948 Nag. 258. In that case it was said by Bose J. that "The words "illegally" and "Material irregularity" do not cover either errors of fact or of law. They do not refer to the decision arrived at but only to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with in letter and spirit". This means that in order to find out whether the subordinate court acted illegally

¹ Venkatagiri v. Iyengar v. The Hindu Religious Endowments Board Madras A. I. R. 1949 P. C. 156.

² Kesho Rao v. Radha Kishan A. I. R. 1953 S. C. 23.

³ Jagdish Pal v. Ganga Prasad A. I. R. 1959 S. C. 492.

⁴ Rasi Singh v. Ram Prasad A. I. R. 1971 Pat. 156.

or with material irregularity, the court has to see how the lower court tackled the case from stage to stage, whether proper procedure was followed, whether the orders passed were within the proper exercise of jurisdiction and were according to law. If there is no such defect no interference is called for.

In a recent Gujrat case it was held that order of the court to pay deficient court fee, if erroneous, results in failure of the court to exercise jurisdiction and the H. C. can interfere in revision.¹ If the trial court proceeded with the case in the absence of a necessary party it was held to amount to illegality.² A new point could not be raised in revision.³ A wrong decision on the question of limitation does not call for interference in revision.⁴

One of the requirements for entertaining a revision, as already pointed out is that the "case" should have been "decided". This is again a matter of conflict of opinion, at least with respect to interlocutory orders. The view expressed by the F. B. of Alld. H. C. in the case of *Chattrapal Singh v. Raja Ram* 7 All. 661 appears to be the accepted view by other H. Cs. as well. It was observed in that case by Mahmud. J. 'The word 'Case should be understood in its broadest and most ordinary sense, unless there were specific reasons for narrowing its meaning. It would thus include both a suit as also the proceedings during the course of the suit as well as afterwards.'⁵ In respect of interlocutory order, 'The court has to see in each case the nature and the effect of the order on the rights of the parties and to determine whether the order amounts to a decision of a case

What is a
'case
decided'

¹ Fakir Chand Makhandas v. Sri Jagadguru Shankracharya A. I. R. 1970 Guj. 145.

² A. I. R. 1970 Raj. (F. B.) 167.

³ A. I. R. 1970 Raj. 171.

⁴ A. I. R. 1970 Punj. 554; A. I. R. 1964 S. C. 907. For contrary view see. A. I. R. 1971 Cal. 204.

⁵ A. I. R. 1924 Lah. (F. B.) 425. Lal Chand Mangal Sen v. Behari Lal Mehar Chand; S. S. Khanna v. Brij F. G. Dillon 1964 S. C. 497 and 1341 Sec. also A. I. R. 1966 S. C. 1431.

or is it merely an interlocutory order in the sense that it does not finally dispose of the rights of the parties.¹ The F. B. of Lahore H. C. overruling the earlier F. B. case of 1937, held that the word 'Case' used in S. 115 of the Code has been intended by the Legislature to be wide enough' to include interlocutory orders passed in a suit if they relate to some substantial question in controversy between the parties affecting their rights and that this does not always mean the whole suit.²

Indepen-
dent
Procedure

One other condition for the entertainment of revision is that the order should be such against¹ which no appeal lies to the H. C. The word appeal is not restricted to first appeal only. It would include a second appeal as well. Appealable orders are given in S. 104 and OXLII R. 1. of the code. Against such orders whether passed by the trial court or the first appellate court, the H. C. will have no jurisdiction to entertain a revision. Subject to other conditions given in the section, an order or decision which is not open to appeal or further appeal may be questioned in revision. Orders passed in proceedings, before the registration of a suit like those on a pauper application or in proceedings commenced after a suit has ended, like execution proceedings, or independent proceedings started under any legislative enactment, like those under Stamp Act or court fees act on the report of Inspector of Stamps or proceedings for which a different procedure has been provided, cannot be termed as interlocutory proceedings and so the orders passed in such proceedings, may be interfered with in revision.³

Revision under Art. 227 of the Constitution.

The power of superintendence conferred on H. C. by this article can be said to be unlimited as it extends over all courts and tribunals within its territorial jurisdiction with

¹ A. I. R. 1951 All. 335. Firm Jawahar Lal Sunder Lal v. Jagdish Rai Baij Nath.

² Gurdev v. Md. Baksh A. I. R. 1943 L. (F. B.) 65.

³ Sukhdeo v. State of Punjab A. I. R. 1960 Punj. 407.

regard to matters both judicial and administrative. The only exception is the courts and tribunals constituted by or under any law relating to armed forces. The material portion of the article for our purpose is contained in clauses (1) and (2) which read as below :—

- (1) Every H. C. shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.
- (2) Without prejudice to the generality of the foregoing provision the H. C. may—
 - (a) call for returns from such courts;
 - (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and
 - (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

This Article, unlike S. 115 of the code, imposes no conditions for the entertainment of the petition nor does it lay down any grounds which are necessary for interference. In spite of it, the discretion which vests in the H. C. cannot be exercised otherwise than to meet the ends of justice. The object is that if a court or tribunal has done anything illegal or materially irregular which has caused injustice to a person without any fault on his part, and no other remedy is open to him, H. C. in its power of superintendence should interfere and set right the wrong. It is also necessary for the H. C. to see that in doing so no injustice is done to another person. Two propositions have been laid down. One is that this Art. will apply even to those cases where no appeal or revision lies to the H. C. The second is that the power should not ordinarily be exercised if any other remedy is open to the aggrieved person.¹ The S. C. observed that the power of superintendence under

Power &
its extent

¹ Ram Roop v. Vishwanath A. I. R. 1958 All. 456.

this article "is to be exercised most sparingly and only in appropriate cases, in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors".¹ Another guide-line according to S. C., is that the power should not be exercised unless there was grave miscarriage of justice or flagrant violation of law.² This case related to dismissal of an employee and the S. C. said that the H. C. should not reweigh the evidence or correct errors of law in its power under this article. According to reported cases the grounds of interference are only (i) want or over exercise of jurisdiction³ or (ii) failure to exercise jurisdiction.⁴ or (iii) failure to follow the prescribed procedure or violation of the principles of natural justice.⁵ This would show that what appeared to be unlimited power under the language of the article have very much been circumscribed by judicial pronouncement. The powers, under this article are not greater than those under Art. 226.⁶

Tribunal

The word Tribunal has not been defined in the constitution but according to the accepted concept "Tribunal" means, a person or a body of persons, other than a court set up by the State for deciding the rights between contending parties in accordance with the rules having the force of law. On this basis numerous authorities like the Income Tax Tribunal, Industrial Tribunal, Election Tribunal. The Divisional Commissioner hearing appeals under the Motor Vehicles Act, Authorities under the Rent Control Act, an arbitrator under the Cooperative Societies Act etc. have been held to be 'Tribunals'.

Applications under other statutes.

Under this head only such applications will be dealt with as are of common use.

¹ Waryam Singh v. Amarnath A. I. R. 1954 S. C. 215.

² P. N. Banerji v. P. R. Mukerji A. I. R. 1953 S. C. 58.

³ A. I. R. 1953 All. 585.

⁴ A. I. R. 1954 S. C. 295.

⁵ A. I. R. 1957 Bom. 142.

⁶ A. I. R. 1970 S. C. 1926.

Application for a succession certificate.

An application for grant of a Succession certificate (S. C.) has to be filed for realisation of the debts or securities, or the G. P. Fund, or the life insurance money due on the life of the deceased (in case there is no nominee) or the money in deposit with any Bank or the like. This is insisted upon to give a valid discharge to the debtor, so that he may not be harassed by other claimants. The application has to be filed in the court of the District Judge (or any other court to which jurisdiction has been transferred) within whose jurisdiction the deceased ordinarily resided before his death, or within whose jurisdiction a part of the property of the deceased may be found. See S. 371 of the I.S. Act. The petition has to be signed and verified in the same manner as a pleading under C. P. C. The application must contain all particulars given in S. 372 i.e. the time and place of death of deceased, his ordinary residence, the names of all near relatives of the deceased, the right under which the applicant makes his claim, and full details of debts and securities in respect of which the certificate is claimed, etc.

The certificate is granted to only one person and if more than one person is entitled as an heir, his rights can be protected by making a provision in the succession certificate that it will enure to the benefit of so and so to such and such an extent. For that purpose a security can also be demanded. It can also be demanded if the application is on behalf of a minor and there is no certified guardian. If a suit has been filed for realisation of the dues of the deceased, the succession certificate may be filed at any time before the close of the arguments or in fact before the passing of a decree.

If an occasion arises for applying for probate or letters of administration the appropriate provisions of law may be looked into. In some states like U. P. there is also an Administrator-General for administering the property of the deceased, working under the directions of the H. C.

Application under the Pro. Insolvency Act.

A petition for insolvency may be made by the debtor U/S. 7 of the Act if he has committed any act of insolvency given in S. 6 of the Act. Generally speaking such acts, as transfer of the whole or substantial portion of the property to a third person, or transfer of the property with the mala-fide intention of delaying or defeating the creditors, or any fraudulent preferential transfer of property or his going under ground to evade the creditors are some of the acts of insolvency. A petition of insolvency may be presented to the court having jurisdiction, both by the debtor, if the conditions given in S. 10 are fulfilled, as well as by creditor. More than one creditor can join in the same application or they may give separate applications, if the conditions given in S. 9 are complied with. If there are more than one applications they will all have to be consolidated under S. 15. In both the cases the outstanding debts should not be less than Rs. 500/-. It is also necessary that the acts of insolvency should have been committed within three months in case the application is given by a creditor. Under S. 7 the presentation of an insolvency petition by a debtor is itself treated an act of insolvency. The petition has to be framed in the light of S. 13 giving the particulars mentioned therein.

As soon as a petition is admitted an interim receiver is appointed to take possession of the property of debtor. In almost every district of U. P. there is an Official Receiver who is informed of the petition and is appointed an interim receiver. After hearing, if the debtor is adjudged an insolvent the court has to fix a period for his discharge in the order. It is generally six months and is liable to be extended from time to time. As a consequence of adjudication the property of the insolvent vests in the official Receiver from the date of application.

Application under the Guardians and Wards Act.

Under the personal law of a minor, to whatever comm-

unity or religion he may belong to, the nearest relative, father coming first followed by the mother, is treated to be the natural guardian of the minor. A guardian is defined as a person having the care of the person of a minor, or of his property or of both the person and property. This term includes, natural guardians, a testamentary guardian, a guardian appointed or declared by a court and a person empowered to act as such by or under any enactment. The court, in appointing a guardian, is primarily guided by the consideration of the welfare of the minor. It has to see that he is a proper and fit person to look after the minor and his interest.

It may also be noted that in 1956 the parliament in an attempt to codify the Hindu Law passed a number of enactments including the Hindu Minority and Guardianship Act. The provisions of that act are only supplementary to guardians and Wards Act. The appointment of guardian of a minor whether Hindu or not is still governed by the provisions of G. W. Act.

Any person desirous of being appointed a guardian of a minor, has to apply (see S. 8.) to the District Judge having jurisdiction in the place where the minor ordinarily resides. In case of guardianship of the property alone the application may also be made to the D. J. in whose jurisdiction the property is situate (S. 9). The form of application is given in S. 10. The application requires to be signed and verified in the same manner as a plaint. It is also necessary that the application must be accompanied by a declaration of the willingness of the proposed guardian signed by him and attested by atleast two witnesses. If the application is made by a distant relation or a friend, and a nearer relative is living, the application should show why he is not fit to be appointed as guardian, and that the application is a bonafide one.

The mere presentation of the application is no ground to presume that the application will be admitted. The court

has a discretion in the matter and it has to be satisfied, before registering the application that the appointment of a guardian will be in the interest of the minor and for his welfare. If there is no good cause or if it appears to the court on the examination of the facts disclosed, that the application has not been made with bonafide intention, it may reject it summarily. On admission of the application procedure given in S. 11 onward has to be followed for determination of the question. The guardian after appointment has duties to perform as given in S. 24 & 27 and he stands in a fiduciary relation to the ward and unless otherwise provided he cannot make any profit out of his office (See S. 20).

Applications under the Arbitration Act.

An arbitration with regard to any dispute may take place both without or with the intervention of the court. In case of the former there may be occasion to make applications under Ss. 8, 11 & 12 to invoke the powers of the court or to contest under Ss. 15 & 16 the validity of the award when filed under S. 14. but they are only a few and far between and so the relevant provisions may be looked into when the occasion arises. The importance of such application lies in arbitration with the intervention of the court and a reference is made to only such application.

An arbitration with the intervention of the court may be done when a dispute has already arisen and a suit in respect of it is pending in any court, or when differences are apprehended in future with respect to the subject-matter of an agreement, and the parties thereto have agreed to get such differences settled through arbitration. In the former case the parties to the suit or some of them if their interest is separable (See. S. 24) nominate the arbitrator either through an application or by a joint statement before the court. The court after obtaining the consent of the arbitrator makes a reference (Ss. 22 & 23). After the award

is filed, the parties may file objections for modification of the award on the grounds given in S. 15, or for remitting the award on the grounds given in S. 16 or for setting aside the award on the grounds contained in S. 19 of the act. It is for the counsel to see that the objection has a substance, and is not intended to cause delay.

The other manner of arbitration through the intervention of the court, is to make an application to the court having jurisdiction under S. 20 of the Act for filing the arbitration agreement, but this can only be done if no suit has been instituted with regard to the dispute or differences agreed to be referred to arbitration. Such an application is registered as a suit. It has to be drafted in the same manner as a plaint and it must contain all the material facts with necessary particulars making all interested persons, who are necessary to be brought before the court, as parties to the application. It must be signed and verified. The opposite party has a right to contest, after a notice is served upon him. If there be no sufficient cause against, the court shall order, that the agreement be filed. It shall at the same time order that a reference be made to the arbitrator or arbitrators nominated by the parties, or appointed by the court. If each party appoints his own arbitrator, the arbitrators in their first meeting, before entering upon the reference (which must be done within thirty days of the receipt of the courts order) should appoint an umpire, and there-after proceed with the arbitration and give award within four months of the date of entering upon the reference. The time for award can be extended under the agreement of the parties or by the court. When the award has been made it shall be signed and the arbitrator or the arbitrators shall give notice in writing to the parties of the making and signing the award. There-after the award can be filed in court in the manner provided in S. 20 (2)

Election Petition under R. P. Act.

The drafting of an election petition, more precisely its

material portion is not very much different from a plaint in a civil suit. The law, however, prescribes certain technicalities which have to be carefully fulfilled, for any omission or mistake in that behalf may prove fatal.

Every election petition has to be founded on any one or more grounds given in S. 100 and 101, as required by S. 81. According to S. 83 such a petition must contain :—

(a) a concise statement of the material facts on which the petitioner relies,

(b) full particulars of any corrupt practice, that the petitioner alleges, with the further details as to who committed them when and where and in what manner,

(c) the relief claimed i. e. a declaration that the election of all or any of the returned candidates is void, and in addition a further declaration, declaring the petitioner or any other candidates as duly elected may also be sought.

The petition has to be signed and verified in the same manner as any pleading under C. P. C. The schedules and annexures attached to the petition have also to be signed and verified likewise. In case the petition seeks only the declaration that the election is void in respect of the returned candidate or candidates, he has to implead only the returned candidates. In case further relief of declaring himself or any other candidate as the returned candidate is sought, all the contesting candidates must be made respondents.

Before presentation of the petition the security for costs has to be deposited in favour of the Secretary to the Election Commission, in any Govt. Treasury or the Reserve Bank of India. The receipt of such deposit has to be enclosed with the election petition (S. 117). The election petition has to be presented within forty-five days but not earlier than the date of election of the returned candidate. It has to be presented by the petitioner or his duly authorised agent to the Election Commission. Its presentation to the Secy. to the Commission or any other person nominated

in this behalf will be taken as a valid presentation. Every petition which does not comply with the provisions of S. 81 or 82 or S. 117 is liable to be dismissed after giving an opportunity to the petitioner to be heard. If the petition contains no defect or is not dismissed under S. 85 it shall be caused to be published in official Gazette with copies to parties and then the petition is referred to the Election Tribunal appointed in this behalf for its disposal in accordance with the law and rules.

Due to the multiplicity of political parties in the country every election to Parliament or the State Legislature is hotly contested and almost every defeated candidate entertains a desire of filing an election petition whatever be the chances of success. This must be discouraged in the public interest. The chances of success must be carefully weighed after a thorough examination of all the evidence, facts and circumstances before taking the risk of filing a petition. The dismissal of a large percentage of election petitions filed after the last four or five general and mid-term elections should serve as a warning to the intending petitioners.

Writ Petitions

Petitions, made under Articles 132, 133, 136 and 227 of the constitutions have already been dealt with. Writ jurisdiction is exercised by the Supreme Court under Art. 32 and by the High Courts under Art. 226. The Supreme Court can be moved only for the enforcement of the fundamental rights guaranteed under Part III of the Constitution, while High Courts can be approached for infringement of any fundamental right as well as "for any other purpose."

Both S. C. and the High Courts in India have been conferred powers to issue five kinds of writs specifically mentioned in Art 32 (2) and in Art. 226(1), in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari, or any one or more of them with the further power to issue "such" other directions and orders as may be considered appropriate in any case,

So far as the enforcement of Fundamental rights goes, the Supreme Court and the High Courts have concurrent jurisdiction. It depends upon the choice of the petitioner whether to approach the H. C. first and then make an attempt to go to the S. C. in appeal or file a writ petition directly in the S. C. This point had been considered by the S. C. in the case of *Ramesh Thaper* where a writ had been directly filed in S. C. It was pointed out by the S. C. that "this court is constituted as the Protector and guarantor of fundamental rights' and so it cannot consistently with its responsibility, refuse to entertain applications seeking protection against infringement of such right".¹ It is a different matter that the S. C. may not entertain a second writ petition after the first has been dismissed by the H. C.² or the 2nd petition is defective as certain required conditions have not been fulfilled,³ in Tax matters.

Act 32 is itself a fundamental right guaranteeing right to Constitutional Remedies. Clause (1) guarantees a right to a person to move the S. C. by appropriate proceedings for enforcement of the right conferred by Part III. The S. C. is thus made a guarantor and protector of fundamental rights.⁴ The underlying idea in conferring power on the S. C. under Art. 32 and on the H. C's. under Art. 226 for the enforcement of the fundamental rights as explained by the S. C. is that "the Constitution having provided for the fundamental rights, it was thought necessary to provide also a quick and inexpensive remedy for the enforcement of such rights. In the State's sphere new and wide powers were conferred on the H. C's. for issuing directions, orders or writs, primarily for the enforcement of fundamental rights, the power to issue such directions for any other

¹ *Ramesh Thaper v. State of Madras* A. I. R. 1950 S. C. 124.

² *Gopalan v. State of M. P.*, A. I. R. 1954 S. C. 302.

³ *Coffee Board v. Joint Commercial Tax Officer* A. I. R. 1971 S. C. 870 See also the earlier Cases A. I. R. 1962 S. C. 1621; A. I. R. 1963 S. C. 1811 & 928, A. I. R. 1967 585; Contrary observations in A. I. R. 1964 S. C. 1740 not approved in 1971 S. C. 870.

⁴ A. I. R. 1956 S. C. 43.

purpose being also included.”¹ Powers of the S. C. or those of H. C’s. under Art. 32 and 226 cannot be by-passed by exercise of political powers by the President of India.²

What is the import of the words ‘Directions and Orders’ has been explained in a F. B. case of Nagpur H. C. A. I. R. 1953 Nag. 89(98). These words were said to mean directions and orders as commonly understood. The word ‘direction’ may mean that the person to whom it is issued is not commanded preemptarily to do a particular act or to forbear from doing it, but is merely guided in the matter of the doing of that act or duty or forbearance from doing it. The Bombay H. C. observed that the directions or orders that may be issued need not be *Ejusdem Generis* with the five prerogative writs enumerated by name.³ The S. C. itself made an observation that the Constitution enables the Supreme Court and all High Courts to issue not only prerogative writs but also such other directions, orders or writs as may be appropriate in each case.⁴ A similar view was taken by All. H. C.⁵ Although the power given to S. C. under Art. 32 and H. Cs. under Art 226 is a large one, it has to be exercised in accordance with the well established principles.⁶

From time to time S. C. and H. Cs. have laid down certain judicial considerations and other principles which should ordinarily govern the exercise of the writ jurisdiction of such courts. They are :—

(1) All other alternative remedies must have been exhausted

¹ Election Commissioner of India *v.* S. Venkata Rao A. I. R. 1953 S. C. 210.

² H. H. Maharajadhiraja Mahadew Rao Jivaji Rai Scindia *v.* Union in India A. I. R. 1971 S. C. 530 (579).

³ A. I. R. 1950 Bom. 363.

⁴ Rashid Ahmad *v.* Municipal Board Kairana A. I. R. 1950, S. C. 163 (165).

⁵ A. I. R. 1951 All. 257.

⁶ A. I. R. 1951 S. C. 217 (223); A. I. R. 1951 All. 746.

- (2) There should not have been any unexplainable delay or laches on the part of the petitioner.
- (3) There should not be disputed questions of facts.
- (4) The petitioner should not be guilty of *Suppressio Veri*, and must come with clean hands and
- (5) The writ should not be infructuous or futile.

Alterna-
tive
Remedy

There can be no dispute that the power of the H. Cs. in issuing any kind of writ is discretionary and an appropriate writ can only be issued if the petitioner succeeds in showing that grave injustice will be done to him. For that reason he must first exhaust all other remedies open to him. In case another adequate remedy is available, the court may refuse to exercise its discretion in favour of the petitioner but mere existence of such a remedy is no bar to the grant of relief by issuing an appropriate writ. It is only a factor to be taken into consideration.¹ This is only a rule of discretion and not a rule of law as stated by the Calcutta H. C.² The S. C. observed that when a writ of *Certiorari* is prayed for, the superior court will not ordinarily quash the decision of the inferior court, unless the aggrieved party has exhausted the other statutory remedies.³ It further observed "But this rule requiring the exhaustion of statutory remedies before the writ will be granted, is a rule of policy, convenience and discretion rather than a rule of law." Once the petition has been heard, this plea is of no avail.⁴

The courts may not exercise their power of issuing a writ, if the petitioner has already pursued an alternative remedy⁵ or has allowed that remedy to become time barred⁶ or where the statute which created the right or liability

¹ A. I. R. 1957 S. C. 882 (884) 1959 S. C. 422 (429), 1970 All. (F. B.) 362 (363, 369); for a contrary view see. 1970 Mad. 264.

² A. I. R. 1953 Cal. 548.

³ *State of U. P. v. Mohammad Nooh* A. I. R. 1959 S. C. 86.

⁴ *Hirday Narain v. Income Tax Officer*, A. I. R. 1971 S. C. 33.

⁵ *Ajit v. Sarbamangla* A. I. R. 1954 Pat. 476; *Rashid v. I. T. Commr.* A. I. R. 1954 S. C. 207; *Vijai Transport v. Appellate Tribunal*, A. I. R. 1958 Raj. 165.

⁶ *Vishwamittara v. Authority*, A. I. R. 1955 All. 702.

which is being enforced has itself prescribed a statutory remedy.¹ But the existence of an alternate remedy has not been held to be a bar where infringement of a fundamental right is alleged² a mandatory provision of the constitution has been violated³ the statute providing the alternative remedy or the rule under which the impugned order has been made, is ultra vires⁴ or the alternative remedy is too costly, ineffective or onerous.⁵

No period of limitation is provided for petitions under Art. 226 or 227. As however the jurisdiction in writs is extraordinary, the Courts expect the petitioners to act promptly and can refuse to interfere if there is delay which is not adequately explained.⁶ Delay is however not always fatal and can be excused if sufficient cause is shown.⁷ Some High Courts have imposed on themselves a rule that ordinarily they will not entertain petitions filed beyond 90 days of the accrual of cause of action, e. g., the Allahabad High Court⁸ but if the delay is explained satisfactorily, it may be condoned. Time for obtaining copy of impugned order may be excluded.⁹ Delay

The very nature of the proceedings under Art. 226, shows that the parties should not be allowed to agitate disputed questions of facts in such summary proceedings. It has been held by several H. Cs. including Allahabad H. C. that where the rights claimed by the petitioner cannot be conveniently determined, the H. C. should refuse to exercise Disputed facts

¹ Veerappa *v.* Raman, A. I. R. 1962 S. C. R. 583.

² B. I. C. *v.* State of Bihar, (1955) 2 S. C. R. 603; Himatlal *v.* State of M. P. 1954 S. C. R. 1122.

³ Chaudhury *v.* Union of India, A. I. R. 1956 Cal. 662.

⁴ B. I. C. *v.* State of Bihar, *Supra*.

⁵ Goberdhan *v.* Collector, A. I. R. 1956 All. 271; Himmatlal *v.* State of M. P. *Supra*; A. I. O. Mills *v.* Dutta. A. I. R. 1956 Cal. 450.

⁶ Srinivas *v.* Election Tribunal, A. I. R. 1956 All. 251; Venkateswarulu *v.* State of Mad. A. I. R. 1954 Mad. 87.

⁷ Jagjiwandas *v.* State of Bombay, 1952 D. L. R. 149 (Bom.)

⁸ 1956 A. L. J. 334.

⁹ Sarbajit Singh *v.* Dy Director, 1961 A. L. J. 726.

its discretion under Art. 226.¹

Suppres-
sio Veri

Suppression of material facts and any attempt to mislead the court is considered to be a disqualification for a relief under Art. 226. The reason is obvious. The power under Art. 226 is a discretionary one. The H. C. will refuse to exercise its discretion in favour of a party who by suppressing facts wants to keep the court in darkness and wants to take unfair advantage.²

Futile writ

The last principle on which H. C's. refuse to exercise writ jurisdiction is the futility of the petition, even if the prayer is granted.³ If the court is satisfied that the writ applied for will not serve any useful purpose it may reject the petition.⁴ A second writ petition may be barred by "Res Judicata" if the first was dismissed by a non-speaking order like "Dismissed"⁵

Contents
of petition

Like a plaint, a petition under Art. 226 has three parts. The first part consists of the title which will include the name of the High Court, the names of parties, the number and year of the case and a reference to the Article or Articles under which the petition is filed. Petitions are usually addressed to Hon'ble the Chief Justice and His Companion Judges of the High Court. In some High Courts there is a practice of giving a gist of the relief sought before and immediately above the body of the petition. The second part consists of the main body of the petition containing the facts of the case stated in paragraphs consecutively numbered. If there is any delay in the filing of the petition or any earlier acquiescence or inaction, it has to be explained satisfactorily. After stating the facts, it is usual to state that the petitioner has no other alternative

¹ A. I. R. 1958 All. 141; 1959 All. 369; 1970 A. P. 318, 1957 S. C. 529 (531); 882 & 790.

² A. I. R. 1951 All. (F. B.) 746 (767); 1952 Cal. 72; 1970 Mad. 422; Smt. Maina Devi v. State of U. P. A. I. R. 1971 All. 241.

³ A. I. R. 1956 Cal. 393; A. I. R. 1953 Nag. 121.

⁴ A. I. R. 1954 S. C. 592; A. I. R. 1955 S. C. 305; A. I. R. 1953 Raj. 111 and 1970 Punj 462.

⁵ R. S. Sial v. The State of U. P. A. I. R. 1971 All. (F. B.) 375.

effective, or speedy remedy and that it is necessary for him to invoke the writ jurisdiction of the Court. Then follow the grounds on which the particular writ, order or direction is claimed. The grounds are also divided in paragraphs serially numbered. The last part of the petition consists of the prayer or relief in which is mentioned the particular writ, order or direction, which is being applied for. If any specific order is being challenged, its date must be mentioned in the relief. For drafting different kinds of writ petitions, see the precedents.

All important documents, referred to in the writ petition, which are required to be before the Court, in order to enable it to decide the petition, should be made annexures to the petition, if available, in original. If for any reason they cannot be filed in original, their attested or certified copies must be made annexures. Care should be taken to see that orders which are impugned if they are in writing are made annexures, either in the original or in the shape of attested or certified copies. An affidavit in support of the facts stated in the petition has to be filed, which must be properly verified.

Anexures
and affi-
davit

Practice differs in various High Courts about the prayer for interim relief. At some places prayer for interim relief is permitted to be added to the relief claimed in the petition. In other High Courts a separate application for interim relief has to be made, which is also to be supported by an affidavit. If such a separate application has to be made, the facts necessary to support the prayer for interim relief must be stated along with the relief prayed for.

Interim
relief

As writ petition is not a plaint, no written statement is filed in reply to it. After notice has been served on the opposite parties, they file counter-affidavits. In these counter-affidavits, with reference to each paragraph of the petition the facts alleged are either admitted or denied. If there are any additional facts they must be stated, the stand which the opposite party intends to take, or on which he wants to rely

Counter
and
rejoinder
affidavits

in order to defeat the petition, should be clearly stated. Like the petition the counter-affidavit is also divided into paragraphs but no grounds or reliefs are mentioned in it. It is confined to facts and is only an affidavit in reply and not a petition. If any additional facts are given in the counter-affidavit, which it is necessary for the petitioner to explain or controvert, he files a rejoinder-affidavit which should be confined to additional facts to be explained or controverted. Without the permission of the Court, new or additional facts cannot be put in the rejoinder-affidavit. If they are so put, it will be open to the court to ignore the same.

Principles
of plead-
ings appli-
cable to
writs.

The general principles of pleadings referred to in detail in Chapters I to IV are applicable to writ petitions also. Only material facts are to be stated in the petition and the counter and rejoinder-affidavits and care is to be taken to avoid putting in evidence, arguments or Law.

HABEAS CORPUS

It is a prerogative process remedial and mandatory for securing the liberty of the subject from unlawful detention whether in the custody of the State or a private person. By this writ, release of a person in confinement is sought on the ground that his confinement or detention is without any lawful justification. The person who has kept the prisoner in confinement is asked by the court to produce him before it and to show on what ground he has been detained. If the court is satisfied that there is no justification for his detention, the person is ordered to be released. Such an application may be made by the person detained or by any other person on his behalf. It provides only a safeguard against wrongful detention in order to secure an early release.

The question which the court has to consider is whether there is any unlawful restraint on the movements of the person detained. The court will not ordinarily interfere unless it finds that the person has been deprived of his

liberty against the procedure. "established by law" as provided in Art. 21 or where there has been breach of any of the conditions given in Art. 22.¹ There may yet be another ground i.e., the law under which he has been detained was not within the competency of the Legislature which enacted it, or the particular provision under which he has been detained is otherwise Ultra Vires. The legality of the order has to be seen on the date of hearing.²

The Code of Criminal Procedure also makes a provision in S. 491 conferring jurisdiction upon the H. Cs. to issue such a writ, but the power therein given is qualified by the words 'Whenever it thinks fit' Article 226 gives wider powers to the H. Cs.. In fact both the S. C. under Art. 32, and the H. Cs. under Art 226 can issue suitable directions or orders as may be considered necessary and appropriate in the particular circumstances of a case in order to protect the liberty of an individual, irrespective of the writ of Habeas Corpus. The reported cases will show that writs of this nature have been filed to secure the release of persons detained under the Preventive Detention Act, or of persons violating the terms of Visa, or the custody of the minors, or even of allegedly insane persons detained in asylums.

Mandamus

Mandamus literally means a command. The main purpose of issuing such a writ is to compel an authority, may it be the Government, or court or any legally constituted corporation or any other public Authority, to act according to the provision of law, or forbear from acting in a particular manner which goes against such a provision. The main object is that such bodies should function within the forecorners of law. The person applying for such a writ has to show that he has a legal right to compel the authority for the performance of the alleged duty, which may be of Public nature, i.e. affecting the public at large and specially affecting the rights of the petitioner.¹

¹ Saptawana v. The State of Assam A. I. R. 1971 S. C. 813.

² Talib Hussain v. State of J. & K. A. I. R. 1971 S. C. 62.

Mandamus is neither a writ of course nor a writ of right, but it will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual provided there is no more appropriate remedy.²

When
Manda-
mus will
lie

Thus it will appear that Mandamus is not a writ of right. It cannot be demanded *Ex-debito Justitii* but is issued only in the discretion of the Court.³ As has been put by the Supreme Court "There must be in the applicant a right to compel the performance of some duty cast on the opponent.⁴ The duty must be of a public nature, i.e. created by a statute or some rule of common law.⁵ Merely ministerial acts which an officer has to perform in obedience to the orders of his superior cannot be considered public duties.⁶ The duty to be performed must be imperative and not discretionary. Secondly, before the petition is filed the petitioner should have demanded the performance of duty. The absence of an allegation of demand and refusal in an application for mandamus is fatal to the maintainability of the application.⁷ There should be no other equally efficacious, convenient and beneficial remedy.⁸

Prohibition

The writ of Prohibition is a process issued by a superior court to the inferior court or authority directing it not to usurp a jurisdiction not vested in it or not to exceed its jurisdiction. This writ is similar to *Certiorari*, but they are issued at different stages of the proceedings of the inferior court or authority. Prohibition is issued while

¹ *State of M. P. v. G. C. Mandawar* A. I. R. 1954 S. C. 493 ; 1957 S. C. 529 and an old Calcutta case 1925 Cal. 48; *Air Corporation Employees Union v. G. B. Birade* A. I. R. 1971 Bom. 288.

² *Rex v. Dunsheath*, All. E. I. R. 1950 Vol. 2, p. 741 (745).

³ *Moti Lal v. Uttar Pradesh*, 1951 All. 257 (333) F. B.

⁴ *State of M. P. v. G. C. Mandawar*, 1954 S. C. 493.

⁵ *Ch. Commr. of Police v. Gordhandas*, 1952, S. C. R. 135 (148), *Ghanashyam Misra v. Orissa Association of Sanskrit Learning* A. I. R. 1971 Ori. 212.

⁶ *Halsbury's Laws of England and Ed.* Vol. 9, p. 763.

⁷ *Staynor v. Commercial Tax Officer*, 55 C. W. N. 583; *Annapoorna Farming and fishery Ltd. v. State* 1953 Cal. 756.

⁸ *Dost Mohd. v. Hyderabad Govt.*, 1953 Hyd. 222.

the proceedings are pending in order to prohibit further hearing or continuance of the same while Certiorari is issued to quash the order or the decision already passed or made. In that way they are complimentary to each other. Both kinds of writs can be issued to courts performing judicial functions as well as to authorities performing quasi-judicial functions. The S. C. in the case of Hari Vishnu observed "Both the writs of Prohibition and Certiorari have for their object the restraining of inferior courts from exceeding their jurisdiction and they could be issued not merely to court but to authorities exercising judicial or quasi-judicial functions."¹ There may be occasions when a prayer for the issue of both kinds, of writs prohibition and certiorari has to be made.

Writ of Prohibition, unlike a writ of Mandamus does not lie against an authority, performing purely executive or administrative functions. Its scope is limited to judicial or quasi-judicial functions. It also cannot be issued against any private organisation or any other body which is not authorised to perform judicial or quasi-judicial functions. The object of such a writ being, to stop the mischief resulting from wrong exercise of jurisdiction, the court has to act with judicial circumspection having regard to the facts in each case.

Quo Warranto

This writ is filed with the object of preventing a person holding an office, from continuing in that office on the usual ground that he has usurped the said office and he must show under what authority he is holding the office, and why should he not be ousted. The office must be a public office in which the community at large is interested. It should not be an office in any private organisation. Quo Warranto is a remedy which cannot be claimed as of right or as a matter of course. It lies in the discretion of the court, depending upon the facts and circumstances of each

¹ Hari Vishnu v. Ahmad Ishaque A. I. R. 1955 S. C. 233 (241).

case, to grant or refuse the issue of such a writ. The court has to inquire whether the holder of the office has any legal authority to hold and to continue to hold the office. If no illegality is found the writ will fail. In case of illegality an order of ouster of the incumbent must be passed. It is a writ in which the petitioner does not seek enforcement of his right but questions the right of the respondent to hold the public office.¹ The S. C. observed that Habeas Corpus and Quo Warranto are the only two writs in which enforcement of individual right is not sought.²

It is also necessary that the public office challenged by the writ of Quo Warranto must be held under some law and not rules framed under any executive power.³ By a writ of Quo Warranto appointment of High Court Judges as in Allahabad and Trav. H. Cs. appointment of Speaker in Trav. Co., appointment of Advocate General as in Nag., appointments of Municipal Commissioners, appointment of Vice-Chancellor of Allahabad University, within the jurisdiction of Alld. H. C. have been challenged. Such a writ will not ordinarily be issued if there is some statutory provision providing an effective remedy, as in the conduct of elections, or where there is a mere irregularity which can be cured or where the writ will be futile or infructuous.

Certiorari

A writ of Certiorari is a judicial writ like the writ of Prohibition. It is issued in the form of a command. Both the writs are complimentary to each other as pointed out earlier, and are issued at different stages of the proceedings before courts or tribunals or other authorities performing judicial or quasi-judicial functions, as held by the S. C. in the case of Hari Vishnu referred to earlier. The grounds on which such a writ can be issued are :—

¹ G. D. Karkare *v.* T. L. Shubedar A. I. R. 1952 Nag. 330 (334).

² Calcutta Gas Co. A. I. R. 1962 S. C. 1944.

³ 1955 S. C. 549 ; Nagarajan *v.* State 1966 S. C. 1942 and 1970 Ker. 312.

1. Want of jurisdiction or exceeding the jurisdiction. A. I. R. 1970 S. C. 1926.
2. Any violation of the procedure prescribed, or violation of the principles of natural justice in the performance of its functions. A. I. R. 1970 S. C. 1896 for Student cases See A. I. R. 1971 J. & K. 37; 1971 Pat 43; 1971 Ori 212, 1971, Pun. 340
3. Any mistake or error of law apparent on the face of the record. 1970 S. C. 1958 also see other S. C. cases at pages 1832, and 1334; A. I. R. 1971 S. C. 1531

N. B. A reference to earlier authorities has been purposely omitted.

It would appear from the above grounds that the scope of a writ of Certiorari does not extend beyond the supervisory jurisdiction of a superior court. It can only correct the errors in the exercise of jurisdiction or any error of law apparent on the face of the record or any illegality in following the prescribed judicial procedure by quashing the order. It cannot substitute its own order in place of the order passed by the inferior court as can be done in exercising appellate jurisdiction.¹ The scope is further limited because there can be no quashing of any purely executive or administrative orders but only orders passed in judicial or quashi-judicial proceedings. Inquiry under Commissions of Inquiry Act. 1952 was held to be purely administrative.²

Generally there is no difficulty in determining the judicial character of proceedings, which presuppose the determination of any dispute between the parties according to the procedure prescribed by law, i.e. presentation of the case by parties, taking of evidence, if necessary, giving hearing to the parties or their counsel, and then giving a decision on the rights of the parties on all the disputed points. There

¹ A. I. R. 1955 S. C. 233, 250 and 1104.

² Dr. Harekrishna Mahtab v. Chief Minister of Orissa A. I. R. 1971 Ori. 175.

is also no difficulty in such quasi-judicial proceedings which are determined by a tribunal or authority, which has all the trappings of a court. The difficulty arises in other quasi-judicial proceedings where the trappings of a court are missing and they look like executive acts. There are also certain executive acts based merely upon subjective opinion of the authority, without any sort of inquiry or any requirement of inquiry and such acts too, should not present any difficulty in determining the character of the act or the order passed. Difficulties arise in such administrative or executive acts in which some objective consideration has to be given at some stage and for that reason they look like quasi-judicial acts. In executive acts of this kind and quasi-judicial acts of the above type there is a thin line of distinction. The question has to be determined according to the facts and circumstances of each case and not according to any hard and fast rule.

The S. C. has explained the attributes of a quasi-judicial order.¹ In that case the appellants licence under U. P. Food-grains Dealers Licencing Order 1964 was cancelled without giving an opportunity to the licensee and the State Govt. also dismissed the appeal. These orders were quashed and a writ of Certiorari was issued holding the proceedings as quasi-judicial. It was also pointed out that every quasi-judicial order must be a speaking order. In another case the Court pointed out what constitutes an error apparent on the face of it.² That was a case under the Industrial Disputes Act. Certiorari was also issued when case was decided on irrelevant considerations,³ but there was otherwise legal evidence in support of the findings.⁴

¹ Mahabir Pd. Santosh Kumar *v.* The State of U. P. A. I. R. 1970 S. C. 1302.

² M/s Parry & Co. *v.* P. C. Paul A. I. R. 1970 S. C. 1334 Also see pages 1832 and 1858.

³ Hindustan Steel *v.* K. K. Roy A. I. R. 1970 S. C. 1401.

⁴ Zora Singh *v.* J. M. Tandon A. I. R. 1971 S. C. 1537.

CHAPTER XIX

Affidavits

The affidavits which are daily filed in the Mufassil hardly deserve the name of affidavits. Vague and indefinite statements are made in them in a most irresponsible way and nobody seems to understand that any liability attaches to the declarant if any statement turns out to be false. Without regard to the fact whether the declarant is prepared to swear to all the allegations or not, sometimes the whole application which an affidavit is intended to support is copied out as the so-called affidavit, with the ridiculous result in most cases that points of law and prayers are also inserted in the affidavits. As an affidavit is an important document, and the consequences of a false affidavit are serious, great care is required in drafting it.

As far as possible the affidavit should be filed by a party to the suit or application or by his authorised agent. (excepting the cases by or against the state or any other public body, in which case an officer may do so). In their absence, a person having full knowledge of the facts of the case may also do so.

A court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the court thinks reasonable, provided that the court may order the deponent to appear in court for cross-examination.¹

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be

¹ O. 19, R. 1, C. P. C.

admitted, provided that the grounds thereof are stated.¹

Affidavits sworn "to the best of my knowledge"² or only "on belief"³ are useless. All affidavits must strictly conform to the provisions of O. 19, R. 3, C. P. C. and in the verification it must be specified as to which portions are being sworn on the basis of personal knowledge and which on the basis of information received and believed to be true. In the latter case the source of information must also be disclosed.⁴ Affidavits not properly verified cannot be treated as evidence.⁵

The cost of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same.⁶

The name of the court should be written at the top of all affidavits. If the affidavit is in support of, or in opposition to, an application respecting any case pending or being instituted in the court, the cause-title of such case should be written under the name of the court with the number of the case, if a number has been assigned. If there is no case, the affidavit shall be entitled "*in the matter of the petition of—*". After that, the full name and address of the person making the affidavit should be given thus :—"Affidavit of A. B. son of, etc." Then should follow the affidavit proper. Rules have been made by various High Courts which should be carefully studied and affidavits should be drafted so as to meet all the requirements of those rules. In the absence of any statutory rules, the following rules should be remembered when drawing up an affidavit :—

¹ O. 19, R. 3, C. P. C.

² Akshay Kumari v. Nalini Ranjan, 1956 Cal. 495.

³ Nem Chandra v. State, 1953 All. 99.

⁴ State of Bombay v. Puroshotam Jog, 1952 S. C. 317. Bariem Chemicals vs. Company Law A. I. R. 1967 S. C. 295.

⁵ Ramubai v. Kia Ram, 1964 Bom. 96. Sham Sunder v. Bhart Oil Mills A. I. R. 1964 Bom. 38. Bhupender Singh v. State of Haryana A. I. R. 1968 Punj. 406.

⁶ O. 19, R. 3, C. P. C.

(1) Not a single allegation more than is absolutely necessary should be inserted in an affidavit.

(2) The person making the affidavit should be fully described in the affidavit, and that he is conversant with the facts of the case. The contents of the application have been explained to him and he has understood the same. In case it is a counter-affidavit, it should be stated that the affidavit has been read out and explained to him and he has understood the same.

(3) An affidavit should be drawn up in the first person.

(4) An affidavit should be divided into paragraphs, numbered consecutively, and, as far as possible, each paragraph should be confined to a distinct portion of the subject.

(5) Every person or place referred to in the affidavit should be correctly and fully described, so that he or it can be easily identified.

(6) When the declarant speaks to any fact within his knowledge he must do so directly and positively, using the words "I affirm" or "I make oath and say."

(7) Affidavits should generally be confined to matters within the personal knowledge of the declarant, and if any fact is within the personal knowledge of any other person and the petitioner can secure his affidavit about it, he should have the same filed. But in interlocutory proceedings, he is also permitted to verify fact on information received, using the words "I am informed by so and so" before every allegation which is so verified. If the declarant believes the information to be true, he must add "and I verily believe it to be true."

(8) When the application or opposition thereto rests on facts disclosed in documents or copies, the declarant should state what is the source from which they were produced, and his information and belief as to the truth of facts disclosed in such documents.

(9) The affidavit should have the following oath or affirmation written out at the end :

“I swear that this my declaration is true, that it conceals nothing, and that no part of it is false,”

Or

“I solemnly affirm that this my declaration is true, that it conceals nothing, and that no part of it is false.”

If there are any alterations or interlineations in the affidavit, they must be authenticated by the officer before whom it is sworn. Rules have been made by High Courts for interpretations of affidavits to deponents, identification of deponents and swearing of affidavits.

Amendment cannot be permitted, but a new affidavit should be filed when any mistake or error is intended to be corrected or any addition is intended to be made. The new affidavit need not be in entire supersession of the old and need not therefore repeat all the facts. It may be confined to the matter which is sought to be added or amended thus :—

“I make oath and say that my statement in para 3 of the affidavit sworn by me, and filed, on November 5, 1925, to the effect that Lachman died on August 1, 1925, was based on wrong information and is not correct, and that the said Lachman really died on August 8, 1925.”

PART II
PRECEDENTS

PLAINTS

The requirements of a plaint have already been laid down in Chapter XVII of Part I. It has also been shown in that chapter how the "heading and title" of a plaint should be drafted, what particulars the formal portion of the body of plaint should contain and in what form such particulars should be drawn up. These are the general requirements of all plaints, and are more or less similar in all cases. But the other portions of the plaint, viz., the substantial portion of its body, and the relief claimed, are always different, both in substance as well as in form, in different kinds of suits. Therefore, in the precedents given below, models of only this portion of the plaint have been given, the formal portion and the heading and title having been omitted. In order, however, to show what a complete plaint should be, Precedent No. 1 has been drafted as a full plaint containing all the requirements of law. **The heading, title and the necessary formal portion of the body of the plaint should, therefore, be added to each precedent in order to make it a complete plaint.** As to the formal portion, it must be remembered that the date on which the cause of action arose, the facts showing that the court has jurisdiction, and the valuation of the suit for the purposes of court-fee and jurisdiction, are the essentials of every plaint. Other facts, e.g., those showing that the plaintiff sues in a representative character, or that the claim falls within any exception to the general law of limitation, are to be alleged only in cases in which they are necessary.

The precedents of plaints given in this book are classed into the following three groups according to the nature of the suits—

1. Suits arising out of Contract.

2. Suits based on Tort.
3. Other suits, e.g., those based on personal law, or on any provision of an Act of the Legislature.

I. PLAINTS IN SUITS ARISING OUT OF CONTRACT

Account (a)

No. I—Suit against an agent for account
In the Court of the Civil Judge at Agra

Original Suit No. of 1955.

Alfred Addison, son of the late George
Addison, resident of Etmadpur, district
Agra *Plaintiff*
versus

Muhammad Hussain, son of Ahmad Baksh,
Sheikh aged 45, occupation service, Agra,
Muhalla Nai Ki Mandi *Defendant.*

The above-named plaintiff states as follows :—

1. By a registered general power-of-attorney, dated June 20, 1950, the late George Addison appointed the defen-

(a) The word 'account' has no definite legal meaning. The primary idea of 'account computation' is some matter of debit and credit and it implies that one is responsible to another on the score either of contract or some fiduciary relations of a public or private nature created by law or otherwise.

The following facts must exist to impose an obligation to account. (1) the person upon whom such obligation is sought to be imposed (the obligor) must have received some property not his own. (2) the person seeking to impose the obligation (the obligee) must be the owner of the property in respect of which the obligation is sought to be imposed. (3) The obligor must not have received the property as mere bailee. (4) The obligor must have received it into his possession and control. (5) There must be a fiduciary relation between the obligee and the obligor or there must be privity between them by contract or otherwise. (1953 Calcutta 244, *Ashutosh Roy v. Arun Shankar Dass*; *State of Bihar v. R. B. Das Jalan*, 1960 Pat. 400).

A suit for account is an extraordinary remedy and becomes necessary when the plaintiff does not know the particulars sufficiently enough to enable him to sue for recovery of the money due to him from the defendant. If, however, he knows such particulars of the amount which is

dant as his agent to collect the rents of his estate in villages Soni, Rampur, Chamroli and Kuti.

2. The defendant began collection from the commencement of the year 1358 Fasli and has been collecting rents in the above-named villages ever since.

3. The said George Addison died intestate, and the plaintiff is his son and has obtained letters of administration to his estate.

4. The particulars and details of the collections made by the defendant are not known to the plaintiff, and the defendant has not rendered any account of the money received by him for the said George Addison, either to the said George Addison or to the plaintiff, though the plaintiff requested him to do so.

5. The cause of action for the suit arose on June 28, 1952, when the plaintiff's demand for an account was made and refused.

6. The defendant is a resident of Agra Town, within the jurisdiction of this Court.

7. The value of the subject-matter of the suit for the purposes of court-fee and jurisdiction, is fixed tentatively at Rs. 3,000.

8. The time for filing the suit expired on June 28, 1955, but the Court was closed on that date and remained closed, for the annual vacation, until July 6, 1955.

due to him, he should bring a suit for recovery of that amount. (*Khem Chand v. Tarachand*, 161 I. C. 505; 1936 (Sind. 9). The test is whether having regard to the terms of the agreement between the parties and the nature of the work done; it was possible for the plaintiff to bring a suit for a definite amount or for an amount which was ascertainable, or on the other hand, a total sum could only be determined after the accounts in the possession of the defendant had been examined. (*Anant Ram Munshi Ram v. Speddinga Singh & Co.*, 1960 Punj. 415; *State of Bihar v. Ram Ballabh Das Jalan*, 1960 Pat 400). If the plaintiff knows the particulars of some transactions, but not of others, he can claim a definite sum on account of the former (giving the particulars which he knows), and can call for an account of the latter. But it is not from everybody that an account can be called for. It can be called for from an agent, or a mortgagor in possession, or a trustee managing the trust property,

The plaintiff claims :—

- (1) A full and true account of the money realized by the defendant as agent of the late George Addison; and
- (2) Payment of Rs. 3,000 or such sum as may be found due from him on the taking of such account.

(Sd.) ALFRED ADDISON

I, Alfred Addison, declare that the contents of paragraphs 1, 3, 5, 6 and 8 of the above plaint are true within my personal knowledge, and that the contents of para. 2 and of so much of para. 4 as refers to the defendant not having rendered account to George Addison are believed by me, on credible information received, to be correct. The contents of the rest of para. 4 are true within my personal knowledge. Verified at Agra, this, the 6th day of July, 1955.

(Sd.) ALFRED ADDISON

(Sd.) JWALA PRASAD VAKIL

or a guardian or a managing partner, or a co-sharer in possession of joint property, or a receiver, or from any one else in a similar position who has received money on plaintiff's behalf. It cannot be demanded from a sub-agent (*Banwari v. Pramatha*, I. L. R. (1937) 2 Cal. 124). A coparcener in a Mitakshara family cannot sue the manager of a joint Hindu family for account, unless he establishes fraud, misappropriation or improper conversion or mistake serious enough for reopening the accounts (*Hiralal v. Pyarelal*, 184 I. C. 833, 1939 (All.) 681), *Jyote Bhushan Gupta v. Gokul Chandra*, 1959 A. L. J. 110, *K. Akhalrai Sinha v. K. Mahadevalla*, A. I.R. 1967 Audh Pr. 247, but in a Dayabhag family a *Karta* can be sued for account (*Benoy Krishna v. Amarendra*, 1940 (Cal.) 51, 186 I. C. 546). As there is no statutory liability on a principal to keep accounts for the agent, the latter cannot ordinarily sue the former for account, (*Narmada Charan v. Maharaj Bahadur Singh*, 169 I. C. 930, 1937 (Cal.) 359; *Mirza Najm Affendi v. Kashmir Footwears*, 1946 All. 489), but if, under an express contract or trade usage, it becomes the duty of the principal to keep accounts, the agents can sue him (*Jawahar Singh v. Haria Mal* 60 P. R. 1899; *Gopi Kishan v. Padam Raj*, 37 I. C. 510; *Lakshmi Sugar Mills v. Banwari Lal*, 1959 All. 546), e.g., when the plaintiff is an insurance company agent who is paid commission on the premia paid on all policies effected through him (*Remlal v. Asian Commercial Assurance Co.*, 144 I. C. 505, 1933 (Lah.) 983; *Gulab Rai v. Indi Equitable Insurance Co.*, 167 I. C. 929; 1939 (Sind) 51). The Supreme Court has held that the agent may have an equitable right to sue the principal for account in special circumstances, e.g., where accounts are in possession of the principal or where agents commission cannot be determined without seeing

No. 2—Suit for account against a Commission Agent

1. On June 1, 1593, the plaintiff, by a verbal agreement, appointed the defendant as his commission agent for the sale of grain. The defendant agreed that he would sell the grain sent by the plaintiff to the defendant's shop and would, on request, render to the plaintiff a true and full account of all sales so effected, and would pay over to the plaintiff all moneys received by him for such grain.

principal's account *Narain Das v. SPAM Pchanund* A. I. R. 1967 S. C. 33 Also see *Ramkrishna Agencies v. L. I. C.* A. I. R. 1967 Andhra Pra. 109. But if it is found that the agent had accounts which he withholds or that the agent has no account because of his own failure to keep them due to his own fault, court may refuse to grant him the relief (*Gulabrai v. India Equitable Insurance Co., Ibid*). A creditor cannot sue his debtor for an account of payments made by the latter and of the balance due to the former, as a debtor is not liable to render such account which the creditor ought to know himself. A trustee cannot call upon his co-trustee to render account, though he can have inspection of all the papers and books of account (*Jamna Das v. Damodar Das*, 103 I. C. 225, 1927 (Bom.) 424, 29 Bom. L. R. 418). Calcutta High court has held that such suit is maintainable where the co-trustee was guilty of breach of trust (*Maharaj Bahadur v. Tej Bahadur*, 1940 (Cal.) 416, 190 I. C. 144). A client can sue his counsel (*Ramlal v. Langhran*, 140 I. C. 564, 1933 (Lah.) 60). An assignee of a definite sum of money cannot sue for accounts, he can only bring a suit for the recovery of the specified sum thus assigned. (*Jaini Bros. & Co. v. Shankar Lal*, 1938 (Lah.) 270, 178 I. C. 176, 11 R. L. 414).

In a suit for account, the whole account between the parties should be claimed, and the plaintiff is not at liberty to select capriciously a single transaction (*Godhan Ram v. Jaharmall*, 40 C. 335, 17 C. W. N. 67, 17 C. L. J. 636, 16 I. C. 583; *Lachmi Chand v. Jagoo Lal*, 166 I. C. 953, 1937 (Pat.) 55).

It is essential to allege in the plaint full facts showing how the defendant is liable to render account to the plaintiff, e.g., in a suit against an agent, that he received money for the plaintiff or any part of it. The terms on which one party was employed by the other and any other facts showing that the defendant is an "accounting party" must be alleged. (*Shiva Prasad v. Hanuman*, 1938 (Pat.) 392, 177 I. C. 133. *Kanhaiyalal v. Hiralal*, 1947 Bom. 255, 48 Bom. L. R. 795). Unless a time is fixed by contract for the rendition of account, the accounting party is liable to render account only when called upon to do so. Hence it is necessary to allege that account was demanded and refused, or that the account given was not true and full, and also that the plaintiff was kept in ignorance as to the exact amount due to him. To a suit for account may be added a prayer for the payment of the money due to the plaintiff, and

2. The defendant has, as such agent, effected sales of the grain sent to him by the plaintiff from time to time, and has paid to the plaintiff Rs.200 on August 3, 1953, and Rs. 300 on September 20, 1953.

3. The defendant has not, though requested by the plaintiff so to do, rendered any account to the plaintiff or paid over to the plaintiff all the money received by him for the grain. The said request was made by a registered notice served on the defendant on May 20, 1954.

4. The plaintiff has, in consequence, been unable to discover the names of the purchasers and has been left in ignorance as to how much money has been received by the defendants from the purchasers and how much is still outstanding.

in fact such a prayer should always be made, unless the plaintiff is not immediately entitled to the amount but is only entitled to examine the accounts, as a beneficiary under Sec. 19 (b) Indian Trusts Act. To a suit for account against an agent for collection of rents may be added a prayer for recovery of rents remaining unrealized owing to agent's negligence (*Hari v. Ramjatan*, 180 I. C. 64, 1939 (Pat.) 17). When payment of money is claimed, O. 7, R. 7, requires the amount sued for to be approximately mentioned in the plaint. If an agent is bound to render accounts to several persons jointly all such persons must join as plaintiffs as he cannot be called upon to render accounts separately to each (*Kadir Buksha v. Raichernessa*, 62 I. C. 766) (Cal.).

If a suit for accounts is filed originally against the agent or the trustee and after the institution of such suit the agent or trustee dies, whether before or after the preliminary decree, the suit can be proceeded with against the heirs and legal representatives of the deceased. But a suit for accounts pure and simple without any claim for any specific sum of money against the representative of a deceased is not maintainable (*Profulla Kumar Mullick v. Firoza Sundari Dasi*, 1951 Calcutta 182).

A suit for accounts is not necessarily confined between principal and agent. Wherever it is necessary in order to ascertain the amount of money due to the plaintiff, he may ask the Court to pass a preliminary decree, (1950 E. P. 92 (103) F. B.).

Account can be demanded from an agent, but not from his heirs. (*Brij Mohan v. Abani*, 42 C. W. N. 1157, 1938 (Cal.) 610, 177 I. C. 935) (*Badri Nath v. Kesho Kumar*, 1940 (Pat.) 114). An agent cannot be sued for one item as a debt without settlement of accounts (*Narayan Chettai Aruna Chela Pillai* 1965, 2 M. L. J. 207). If the agent has died without rendering an account, the plaintiff can sue his heirs only for recovery of the specific amount which he can prove was due from him, or for loss suffered by the negligence or misconduct of the agent (*Kumeda*

The plaintiff claims—

- (1) To have a full and true account of such sales.
- (2) Payment of the moneys received, minus the sum of Rs. 500 already paid.
- (3) Interest on such moneys, by way of damages, at 12 per cent per annum or at such rate as the court considers equitable up to the date of suit.
- (4) Interest from the date of suit to the date of payment at such rate as the court deems reasonable.

v. Ashutosh, 17 C. W. N. 5, 16 I. C. 742; *Prem Das v. Charan Das*, 117 I. C. 233, 1929 (Lah.) 362, 11 Lah. L. J. 66). The heir will, however, be liable only to the extent of the property which has come into his hands from the agent. But the heirs of a trustee or guardian can be called upon to render account just as the trustee or guardian could be (*see* Sec. 36, Guardian and Wards Act.). The Calcutta H. C. has, however, held that the heirs of a trustee cannot be called upon to render account but a suit against them will be for recovery of trust fund and therefore if in such a suit a sum is on taking accounts found due to the heirs, decree cannot be passed in that suit in favour of the heirs (*Srish Chand v. Supravat*, 1940 (Cal.) 337, 190 I. C. 295). In the case of a joint family dealing with a third person, the manager alone can sue, and a minor co-parcener cannot, even though he impleads the manager as a defendant, as the manager alone can give a valid discharge (*Khemchand v. Mathradas*, 1939 (Sind.) 289). In the case of a partnership at will, a partner cannot sue for account except for general accounts and dissolution of the partnership (*Kassamal v. Gopi*, 9 A. 120; *K. V. Shanthana Krishna v. K. S. Chellappa*, 101 I. C. 390, 25 L. W. 506), but the court can, in a proper case, decree a partial settlement of account (*Firm of Harijimal Mela Ram v. Kriparam*, 2 Lah. 351), e. g., where the matter in dispute does not involve the taking of general accounts. If an agent dies during the pendency of a suit, the suit can be continued against his heirs but plaintiff can get only the specific amounts which he proves to be due from the deceased (*Sasi Sekharieswar Roy v. Hajiramesa*, 47 I. C. 371). The Allahabad and the East Punjab High Courts are of the view that the position of a *pucca arhatiya*, so far as rendition of account is concerned, is that of an agent also and he is liable to render accounts of the transactions entered into by him on behalf of his constitutents as an agent. (*Ram Bhajan v. Gaya Prasad*, 1962 A. L. J. 20. (S. B.), *Ram Deo Jai Deo v. Seth Kaku*, 1950 E. P. 92).

Once the account is settled between the parties, it cannot be re-opened unless on the ground of fraud or substantial mistake. (1952 Raj. 64).

If account has once been rendered or settled, no fresh suit for account is maintainable, but the suit must be one for recovery of the balance due. The mere production of account or delivery of a set of written accounts without explaining them and without producing vou-

No. 3—Suit by an Insurance Agent against a Company

1. By an agreement in writing dated 31st March, 1958, made at Bombay, the defendant Company appointed the plaintiff as their insurance agent for the Uttar Pradesh, and agreed to pay the plaintiff a commission of ten per cent on all the premia to be paid on the policies to be effected through, or on the introduction of the plaintiff.

2. The plaintiff acted in pursuance of the said agreement and between the 1st April, 1958 and the 31st December 1958, effected and also introduced the following life policies of the defendant company :—

- (1)
- (2)
- (3) etc., etc.

3. The defendant company have paid to the plaintiff during this period only a sum of Rs. 2,000/- on account of commission and has not rendered an account of the premia on the policies referred to in para. 2, although the plaintiff, demanded the account by his registered letter dated the 20th April, 1959.

chers to support them is not rendering an account (*Annoda v. Dwarka*, 6 C. 754; *Madhusudan v. Rakhal*, 43, C. 248; *State of Rajsthan v. Rao Manohar Singh*, 1961 Raj. 143; *Bharat v. Kiran*, 52 C. 766, 1925 (Cal.) 1069; see, however, (1961) 2 M. L. J. 282; *Shiva Prasad v. Hanuman*, 1938 (Pat.) 392, 177 I. C. 133). Even the principal's writing "Seen" on the account book does not mean that the account has been rendered (*Shanker Lal v. Toshnopal*, 150 I. C. 151, 1934 A. L. J. 453, 1934 (All.) 553). But if all the papers are submitted the plaintiff should call upon the agent to explain the accounts, and it will be only on the latter's refusal or neglect to do so that he can bring a suit. He must, therefore, allege in the plaint such demand and refusal (*Bharat v. Kiran*, *supra*). If an account has been rendered and not disputed, the plaintiff must either accept the account or allege some fact which justifies the court in treating the account as imperfect so that a correct account has not been rendered and the defendant is not absolved from his liability, (*Radhika Pershad v. Nand Kumar*, 1944 (Nag.) 7). It is not open to a principal who has got all the accounts of his agent in his possession to employ the machinery of the court for examining the accounts on the off chance of making the agent liable for any sum which on examination may be found due (*Nalini Kumar v. Gadadhar*, 1929 (Cal.) 418, 49 C. L. J.

4. The plaintiff does not know which of the policies have lapsed, matured or been forfeited and therefore is ignorant as to how much money is due to him as commission under the aforesaid agreement.

The plaintiff claims :—

1. To have a full and true account of the moneys realized by the defendant company on account of premia on the above mentioned policies and of the commission due to the plaintiff.

II. Payment of the sum found to be due to the plaintiff on the taking of account after deduction of Rs. 2000 already received.

245). Even a settled account can, however, be re-opened if fraud or substantial error is shown, particulars of which should of course be given (*Bhagwan v. Damodarji*, 42 A. 230, 18 A. L. J. 100, 59 I. C. 20; *Bharat v. Kiran*, *supra*, *Krishna Bhatta v. Ishwara Bhatta*, 169 I. C. 860, 1937 (Mad.) 579), but a mere allegation of undue influence and coercion by the plaintiff is not sufficient to repudiate the settlement and reopen the accounts (*Pethaperumal Chettiar v. Rama Swami Chettiar*, 1938 M. W. N. 895, (1938) 2 M. L. J. 505, 1938 (Mad.) 919). Even a single fraudulent entry is sufficient to have the account re-opened (*Puran Mal v. Ford*, 17 A. L. J. 805). If however, the account-books and papers are with the plaintiff himself he is not entitled to sue for accounts without producing the books and papers. (*Debendra v. Narendra*, 30 C. L. J. 417, 54 I. C. 636, 24 C. W. N. 110; *Mohanlal v. N. W. Ry.*, 5 Lah. L. J. 19). In such cases the plaintiff should point out the entries in the accounts which he alleges to be erroneous, or state what monies have been received and not credited. Specific, direct and distinct averments of this are necessary in the plaint (*Anantha v. Subha Rao*, 13 Mys. L. J. 200).

Valuation:—Subject to local rules framed by some High Courts under S. 9 of the Suits Valuation Act, 1887, or the local amendments if any, to that Act, a plaintiff is entitled to put his own valuation on a plaint and to pay court-fee on that valuation. But the valuation should not be arbitrary and the plaintiff should do his best to give a fair estimate of the relief which he hopes to obtain (*Srimati Mani Devi v. Anpurna*, 1943 (Pat.) 218, 206 I. C. 126). In U. P. it is expressly provided that the suit should be valued at the “approximate sum due.” If a suit is also for payment of the balance, the valuation will only be tentative, and, if more money is found due, a decree will be passed for it on additional court-fee being paid on demand (*Gulab Khan v. Abdul Wahab*, 31 C. 365; *Balwantrao v. Bhima*, 13 B. 517), even if the amount exceeds the court’s pecuniary jurisdiction (*Chidambaran Chettiar v. Muthia Chettiar*, 1937 Rang. 320, (F.B.) 170 I. C. 39). It is unnecessary to make an offer for additional court-fee in the plaint. The Forum of ap-

No. 4—Suit for account against a co-sharer

1. One Basdeo, an uncle of the parties, was owner of the six shops described at the foot of the plaint.

2. The said Basdeo executed a deed of gift in respect of the said shops on September 20, 1956, in favour of the plaintiff and the defendant, giving to each a half share in all and every one of the said six shops.

3. The said shops are all in possession of tenants, and the defendant has been collecting the rents with the consent of the plaintiff.

peal from a decree in suit for account is governed according to Allahabad and Madras High Courts by the valuation originally put by the plaintiff (*Putta v. Rudrabhatea*, 40 M. I, 39 I. C. 439; *Muhammad Abdul Majid v. Ala Bux*, 47 A. 534, 23 A. L. J. 216, 1925 (All.) 376, 86 I. C. 1055), but according to Punjab, Bombay and Calcutta views, by the amount decreed by the lower court (*Budha v. Rallia*—9 L. 23, 1928 (Lah.) 157, 110 I. C. 631; *Ibrahimji, v. Bejanji*, 20 B. 265; *Ijjatulla v. Chandra*, 34 C. 954, 11 C. W. N. 1133 (F. B.) See, however, 1961 M. P. 67).

Jurisdiction. Suit can be filed where account is agreed to be rendered, or where a contract of agency is made or performed or where refusal to give account takes place (*Gobardhandas v. Dowlat Ram*, 94 I. C. 287 Sind). A suit against an agent should generally be filed where the agent works as such and not where the principal resides or works (*Firm Ram Dittamal Sant Ram v. Firm Seth Jot Ram Kidarnath*, 1940 Lah. 171; *Audinarayana v. Lakshmi Naraina*, 1940 Mad. 588, *Tika v. Dowlat*, 22 A. L. J. 591; Rajasthan High Court appears to be of a different view 1961. Raj. 93, 1962 Raj. 122).

Procedure. In such suits, a preliminary decree directing accounts to be taken on such terms as the court thinks proper shall be passed (O. 20, R. 16), though omission to pass a preliminary decree does not make the final decree illegal if the parties have not been prejudiced (*Pandurang v. Gunwantrao*, 109 I. C. 385, 1928 (Nag.) 299). After the defendant has filed the account as directed, the plaintiff is entitled to take objections and a final decree is passed after adjudication of those objections. If the facts are so simple that a final decision can readily be given and the passing of a preliminary decree means an unnecessary lengthening of proceedings, a final decree may be passed at once (*Nallaperumal v. Vallayappa*, 53 M. 475). Where, however, an account of a mortgagee's receipts and profits has to be taken before determining the amount payable by a mortgagor on redemption, the only preliminary decree will be that under O. 34, R. 7, and no separate preliminary decree under O. 20, R. 16 should be passed (*Naunihal v. Skinner*, 1925 (All.) 707). The fact that defendant has suppressed the accounts is no ground for passing a final decree straightway (*Palaniappa v. Ramanathan*, 1939

4. The plaintiff requested the defendant to render to him an account of all the moneys realized by him as rent from September 20, 1956, but the defendant has not rendered any account of collection of rent, or paid to the plaintiff his half share, or any portion, of the money so realized.

5. The plaintiff is not aware of the exact amount realized by the defendant from the tenants.

The plaintiff claims—

(1) To have a full and true account of all the moneys realized by the defendant from tenants of the aforesaid six shops.

(2) Payment of a half share out of the moneys realized by the defendant.

(3) Interest on the money found due to the plaintiff by way of damages at six per cent per annum or at any other equitable rate, from the date of demand to the date of suit.

(4) Interest from date of suit to date of payment at such rate as the court deems reasonable.

M. W. N. 360, 49 L. W. 608). It is unnecessary to pray in the plaint for the appointment of a commissioner to take accounts. The court can be moved for this, if necessary, at the proper stage. If the defendant does not render account as directed by the preliminary decree, the plaintiff may prove in any way what amount is due to him (*Ramjilal v. Bujan*, 28 P. L. R. 98, 9. Lah. L. J. 94, 109 I. C. 820, 1927 (Lah.) 782).

If on taking accounts a sum is found due to the defendant, a decree for that amount can be passed in favour of the defendant on his paying the necessary court-fees (*Parmanand v. Jagat Narain*, 32 A. 525, 6 I. C. 162; *Contra*, *Najan v. Salemahomed*, 24 Bom. L. R. 998, 77 I. C. 943; *Panuganti v. Zamindar of Taruvur*, 42 M. 873, 53 I. C. 234; *Bhawani v. Chhajju*, 168 I. C. 983, 1937 (All.) 276, 1937 A. W. R. 16; *Firm Kalu Singh v. Baldeo Singh*, 1942 (Lah.) 81). A suit against an ex-guardian can be filed after the ward has attained majority as well as during his minority. In the latter case, the permission of the District Judge should first be obtained under Sec. 36 Guardians and Wards Act, by any person who wishes to bring the suit as the minor's next friend. But **the permission being only a condition precedent, need not be pleaded in the plaint.** The mere filing of an account under Section 34 (c) by the guardian does not relieve him nor can the scrutiny of the account by the Judge even if he makes one under the Allahabad ruling in *Sita Ram v. Gobindi*, 22 A. L. J. 585, 80 I. C. 592, 46A. 458, but an order of discharge under Section 41 (4) bars a suit for account. If, however, an account has been

No. 5—Suit for account against an ex-guardian

1. The plaintiff was, up till August 4, 1954, minor, and the defendant was, by an order of the District Judge of Meerut, dated June 20, 1947, appointed guardian of the property of the plaintiff.

2. The defendant was, on the application of the plaintiff's mother, removed from guardianship by the said District Judge, by an order dated September 21, 1953.

3. During the period of his guardianship, the defendant remained in possession of the plaintiff's property and realized the income thereof, but did not render any account of his income though requested by the plaintiff so to do, nor has he paid to the plaintiff any sum out of that due to him on account of net profits for the said period. This request was made by the plaintiff verbally on March 20, 1955.

4. The plaintiff is not aware of the income which the defendant realized or of the expenpiture he made on the plaintiff's behalf.

filed by the guardian and it is alleged to be wrong in certain particulars, the suit will properly be not one for account but for recovery of the money due according to what plaintiff thinks should be the correct account. In such a case the plaintiff should refer to account filed by the guardian in his plaint, should specify where it is wrong and should show what would be due to him if the mistakes in the account were corrected, and the suit should be for recovery of that amount.

Limitation. For such suits against an agent was 3 years from the date the account was demanded and refused, or where no such demand was made during the agency, when the agency terminated (Arts. 88 and 89) of Lim. Act, 1908. Art. 3 of the Act of 1963 also provides a period of 3 years for a suit by a principal against his agent for movable property received by the latter and not accounted for. The starting point is the same as before. A demand after termination of agency does not give a fresh start for limitation (*Hingulal v. Sarju Pd.*, 169 I. C. 135, 1937 (All.) 363). Art 89 of Lim. Act, 1908 was applied even to a suit by a principal's son after principal's death (*Bir Bikram v. Jadav Chandra*, 40 C. W. N. 245). An agency is deemed to terminate when a business of agency is completed though liability to render account may continue (*Gobardhandas v. Gokul Khataso*, 96 I. C. 79, 1926 (Sindh.) 264; See however *Babu Ram v. Ram Dayal*, 12 A. 541; *Fink v. Beldeo Das*, 26 C. 715); neglect to comply with a demand may amount to refusal (*Pran Ram v. Jagdish*

The plaintiff claims—

- (1) To have a full and correct account of the income and expenditure realized and incurred by the defendant in respect of the plaintiff's property during the period of the defendant's guardianship.
- (2) Payment of the balance due to the plaintiff.
- (3) Interest from date of suit to that of payment at such rate as the court deems reasonable.

49 C. 250), but there must be a definite repudiation on the part of the defendant of a liability to account or any circumstances from which the failure or omission to render account might be construed as a refusal (*Abdul Latif v. Gopeswar*, 56 C. L. J. 172). When the agent promises to submit the account his conduct cannot amount to refusal. If a particular date is fixed for settlement of accounts, the agency should be deemed to continue upto that date and limitation will begin to run from that date (*Lakshmi Chand v. Firm Chajjimal*, 91 I. C. 487, 1926 (Lah.) 200). When agency is revoked by a letter, the cause of action cannot arise until the letter reaches the agent (*Ramchander v. Rure Kunwar*, 1939 (All.) 739, 1939 A. L. J. 961, 1939 A. W. R. (H. C.) 735). There is no limitation for a suit against a trustee (Sec. 10, Limitation Act), but if there is no express trust, Section 10 will not apply and Art. 120 of Act of 1908 was applied in such a case (*Annamalai v. Mathukaruppan*, 1931 (P. C.) 9, 130 I. C. 609, 60 M. L. J. I, 35 C W. N. 145). A suit between one co-owner and another was held to be governed by Art. 120 and not by Art. 62 of Lim. Act, 1908. (*Abu Shabib v. Abdul Haque*, 1940 (Cal.) 363, 189 I. C. 642). Suit by ex-minor against guardian was held to be governed by Art. 120 (*Smt. Mani Devi v. Smt. Anpurna*, 1943 (Pat.) 218, 206 I. C. 226). Now Art. 113 of the Act 1563 has replaced Act 120 of the old Act.

Defence. The defendant may plead that he kept no accounts but the plaintiff himself used to do so and the defendant always gave every sum that he received for the plaintiff immediately to the plaintiff. He may plead that all the account books, papers and vouchers are with the plaintiff, hence he cannot render any account. He may plead that account was never demanded by the plaintiff, or that it had been settled. Settlement of account need not be in writing, the account need not be compared and expressly admitted as correct, but it can be inferred from conduct, e. g. keeping the account for a long time without objection (*Maneklal v. Jawaladutt*, 1947 Bom. 135, 28 Bom. L. R. 727, 230 I. C. 461). He may plead that the transaction of which account is demanded forms part of numerous transactions or that the period selected by the plaintiff is not the whole period for which account should have been asked for. If he is an ex-guardian, he may plead discharge by the court under Section 41 (4), G. & W. Act. An agent cannot plead that another person had been appointed by the principal to supervise his

ACCOUNT, SUIT ON (b)

No. 6—Suit on mutual, open and current account

1. The plaintiff firm carries on business as sugar merchants at Delhi and the defendant firm carries on business as *grain dealers* at Rohtak.

2. In the month of *Baisakh*, 1979 *Sambat*, (corresponding to April, 1922), it was verbally agreed between Ram Lal, Manager of the plaintiff firm, and Sada Sukh, Manager of the defendant firm, at the plaintiff's shop at Delhi that the plaintiff firm should supply to the defendant firm as much sugar as the latter would order in writing and the defendant firm should supply as much grain to the plaintiff firm as the plaintiff firm would order in writing, and that from time to time account would be made of the price and cost of grain and sugar supplied to the plaintiff firm and the defendant firm respectively, and the balance due from one party to the other would be paid in cash at Delhi.

It was also a term of the aforesaid agreement that interest would be calculated on each item at 9 per cent per annum.

3. The dealings between the parties on the aforesaid agreement commenced from *Jeth Badi* 1979 (corresponding to—) and continued upto *Aghan Sudi* 15, 1984 (corresponding to—) and during this period Rs. 18,960, became due

work if it can be *prima Facie* shown that he has made realisations (*Deb Prasanna v. Lakhi Narain*, 196 I. C. 641.) (Pat.)

(b) An account between two parties may be either one-sided or mutual. It is one-sided when the obligations are all on one side and the payments are only in discharge of these obligations and do not create independent obligations, e. g., an account between a creditor and debtor or between a supplier of articles on credit and his customer, or between a banker and his customer (*Puttulal v. Jagannath*, 1935 A. L. J. 33, 1935 (All.) 53; *Bejoy Kumar v. Satishchander*, 1936 (Cal.) 382). It is mutual when there are mutual or reciprocal dealings between two parties, and each party comes under liability to the other, i.e., the transactions on each side create independent obligations on the other and the balance usually shifts from one party to the other (*Chittar Mal v. Behari Lal*, 6 A. L. J. 921; *Premji Virji v. Sasoon*, 102 I. C. 225, 29 Bom. 375, 1927 (Bom.) 225; *Ramaswamy v. M. S. M. Chettyar*, 1936 (Rang.) 495; *Firm Mansa Ram v. Hira Lal*, 1940 All. 209. But it is not necessary that the balance should

to the plaintiff firm from the defendant firm and Rs. 12,730 became due to the defendant from the plaintiff firm, thus leaving a balance of Rs. 6,230 against the defendant firm. Full particulars of the items on each side of the account are given in the list appended to the plaint, which the plaintiff prays may be treated as part hereof.

4. The aforesaid mutual account of the parties has been kept according to *Sambat* year, and the last item in the said account is of *Aghan Sudi* 15, 1984 *Sambat*.

The plaintiff claims—

- (1) Rs. 6,230 principal and Rs. interest; and
- (2) interest from date of suit at 6 per cent per annum.

No. 7—Suit on account which is not mutual, and alternatively on balance struck

1. The plaintiff is a money-lender and carries on a shop for the sale of grain, cloth and other commodities of household use in village—

always shift from one side to the other and shifting of balance is not necessary criterion of a mutual account. But the balance should be *capable of* so shifting (*Karsondas v. Surjbhan*, 145 I. C. 630, 35 Bom. L. R. 929, 1933 (Bom). 450). The Fact that once or twice there were over-payments which were afterwards adjusted does not make the account mutual (*Gokuldas v. Radha Kishan*, 1933 Nag. 50, 142 I. C. 123; *Basant Kumar v. Chota Nagpur Banking Association*, 1948 Pat. 18). There should be independent transactions between the parties and accounts should consist of reciprocity of dealings and not of items on one side only though made up of debits and credits. In one set one of the parties should hold the position of creditor and the other of debtor, and in the other the position should be reversed (*Dau Dayal v. Pearelal*, 50 A. 615, 108 I. C. 694, 26 A. L. J. 353). The shifting balances must be caused by independent obligations. If there are obligations on one side only, and on the other there are items discharging the obligations, the account will not be mutual. (*Hindustan Forest Co. v. Lal Chand*, 1959 S. C. 1349). For test of mutual account also see *State of Bihar v. Motilal* A. I. R. 1964 Pat. 127. *Kedarnath v. Amin chand Pyarelal* A. I. R. 1965 Cal. 246.

If the mutual account is open and current, i.e., has not been settled and is running, a suit for balance due on it can be brought within three years from the close of the year in which the last item admitted or proved is entered, such year to be computed as in the account (Art. 85 of Lim. Act, 1908, and Art. 1 of Act of 1963). There is a great advantage which such an account has over an account which is not mutual, open and

2. On June 1, 1922, it was verbally agreed between the parties that the plaintiff would advance such sums of money and would supply on credit grain, cloth and such other articles, from time to time, to the defendant as the latter would require and that the defendant would repay the loans and would pay the price of articles purchased, when demanded with interest at 2 per cent per mensem.

3. Between June 1, 1922 and April 20, 1924, the defendant took various loans and made various purchases from the plaintiff and made several payments on account. particulars of such loans, purchases and payments are given at the foot of the plaint.

4. On April 20, 1924, an account was made and a balance of Rs. 1,024 was found due from the defendant. The defendant admitted the correctness of the balance which was recorded on page 6 of the plaintiff's *Khata Bahi* and signed by the defendant. The defendant at the time agreed to repay the balance with interest at 1 per cent per mensem within two months. This agreement was made by the defendant in writing endorsed under the balance on the same page 6 of the plaintiff's said *Khata Bahi*.

current, as, in the latter case, the statute runs against each item from its date and a suit cannot be brought in respect of any item after the lapse of three years, while in the case of mutual account, even if all the items are more than three years old, the suit would be within time if filed within the time allowed by Art. 1. The last item should, however, be real and not bogus, and if a defendant challenges that the last item set up as saving limitation is not real or is not made, with his consent or knowledge the plaintiff will have to prove it (*Firm of Fillip and Co. v. Mohammed Ali*, 55 I. C. 822 Sind.). If the mutual account is closed and is not open, Art. 85 or I will not apply. But an account is not necessarily closed whenever a balance is struck (*Jwaladas v. Hukum Chand*, 66 I. C. 387 Lah.), unless the account is finally closed. If, in spite of the balance mutual transactions take place after that and are entered under the balance, the account is open (*Abdul Haq v. The Firm, etc.*, 71 I. C. 259 Lah.). Ordinarily balance is struck at the close of a year and the balance is carried forward to the account of the next year. The first year's account cannot in such cases be said to be closed. But where the balance was not so carried, and new items were entered in a subsequent account and the balance of the previous account was afterwards added to the balance of the new account, it was held that the whole did not become one account (*Firm Bhagwandas Kanhayalal v. Firm Nand Singh*, 100 I. C.

5. The defendant has not made any payment since April 2, 1924.

6. The defendant has not paid the amount, or any part thereof, and the plaintiffs claim it either as balance due on the original account or, in the alternative, on the basis of the new agreement of April 20, 1924.

The plaintiffs claim—

(1) Judgment for Rs. 1,024, on account of principal and Rs. 125 on account of interest from April 20, 1924 to the date of suit; and

(2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

815, 28 P. L. R. 146). An account was opened in a bank. For some time it was alternately in credit or overdrawn; from December 1928 it was always overdrawn upto June 1929. The Bank took a promote as security for overdrawals and then the customer went on making payments towards the amount overdrawn. It was held that from June 1929 the character of the account was changed and it no longer remained a mutual account (*Bengal Burma Trading Co. v. Burma Loan Bank Ltd.*, 1937 (Rang.) 340). The same view has been taken in *Basant Kumar v. Chota Nagpur Banking Association* 1948 Pat. 18 where it was held that each overdraft should be regarded as a separate transaction to which Art. 57 of Lim. Act, 1908 should apply.

In a suit on a mutual, open and current account, the plaintiff must show the nature of the account between the parties, the items on either side, either in the plaint or as particulars, the date of the last item, and the date of the close of the year of account should be mentioned as that on which the cause of action accrued. Such suits are always for the balance due and not in respect of a particular item. If the account upon which a suit is based is a forgery, no decree can be passed even on the admitted sum by the defendant (*Nagina Rai v. Raghubar Singh*, 173 I. C. 256, 1938 (Pat.) 42.).

If the account is not mutual, a suit can be brought only for those items which are within the period of three years. If there have been payments, the same can, of course, be appropriated towards discharge of the earlier items on the debit side. In fact in all cases of running account payments are assumed to go to liquidate the earlier items in order of time (*Jiban Ram v. Sagarmal*, 1933 (Pat.) 267, 145 I. C. 611). As to how far it is necessary to plead balances, if any, struck during the course of dealings, see the next note under "Account Stated."

Particulars : Full particulars of the account which is the basis of the suit should be given in the plaint, or, if long may be appended to the plaint. It is not sufficient that copies of ledger and day book are attached to the plaint, as they are not particulars but merely evidence of particu-

ACCOUNT STATED (c)**No. 8—Suit on an account stated**

1. The plaintiffs carry on business as grain dealers at Kanpur and the defendants carry on business as sugar merchants at Muzaffarnagar.

2. The plaintiffs used to order from the defendants raw sugar from time to time on credit, and the defendants used to order *arhar* (pulse) from the plaintiffs from time to time on credit.

3. On April 20, 1923, Ramlal, the Managing Proprietor of the defendants came to the plaintiffs' shop and, after going through the accounts on each side, agreed that there was a balance of Rs. 2,462 in favour of the plaintiffs. The said balance was entered on page 8 of the plaintiffs' *Khata Babi*, and was duly signed by the said Ramlal.

4. The defendants have not paid anything since April 20, 1923.

The plaintiffs claim—

Judgment for Rs. 2,462, with interest from date of suit to that of payment at such rate as the court deems reasonable.

No. 9—Suit on original account, with alternative Claim on account stated

1. The plaintiffs carry on business as grain dealers at

lars. It will be convenient to specify the account by mentioning all items on debit side and on credit side in parallel columns, with particulars of date and amount in each case, thus—

<i>Credit</i>		<i>Rs.</i>	<i>Debit</i>		<i>Rs.</i>
14- 7-24	Cash	10	20- 6-24	2 mds. of wheat	14
13- 8-24	1 md. sugar	16	20- 7-24	1 md. of rice	20
14-11-24	1 md. molasses	6	3- 8-24	1 md. of ghee	80
15-12-24	1 md. gur	7	10-10-24	20 srs. of cotton	20
		<hr/>			<hr/>
		Total 39			Total 134
		Balance due Rs. 95			

(c) Where a plaintiff sets up a case on account stated, it is incumbent on him to say so in clear terms or at least to allege and prove that

Agra, and the defendants is a sugar merchant at Meerut.

2. In the month of May, 1921, it was agreed between the parties by exchange of letters that the plaintiffs would send as much *arhar* (pulse) to the defendants as the latter would order, and the defendants would send as much raw sugar to the plaintiffs as the latter would, from time to time order in writing, and that at the end of the year, an account would be made of the price and cost of the pulse and raw sugar supplied by the plaintiffs and defendants respectively and the balance due from one party to the other would be paid in cash. It was also agreed that interest would be calculated on each item at 9 per cent per annum.

3. From June 1, 1921, to April 10, 1923, Rs. 4,560 became due to the plaintiffs from the defendants on account of the price and other costs of *arhar* purchased by the defendant from the plaintiffs, and Rs. 2,120 became due to the defendant on account of the price and other costs of sugar purchased by the plaintiffs from the defendants from time to time. Full particulars of items on each side of the account

there were reciprocal items of accounts which were settled and adjusted between the parties and that the balance found due to the plaintiff was the result of an agreement to set-off items on one side of the account against those on the other (1949) Oudh 48 (49)).

'Account Stated is an admission of a sum of money being due from the defendant to the plaintiff on account of balance of cross demands on either side. There should be a mutual account between the parties. This had formerly been interpreted by the majority of the High Courts to mean that there should be two independent accounts entries in one of which are set off against those in the other, and that if A advances money either in one lump-sum or from time to time to B and B makes payments towards the liquidation of that debt, or if A is employed by B who owes him his salary and makes payments towards that salary from time to time, the account is only one-sided, that is, on the side of A, and the balance of such account cannot be called "account stated" (vide *Raj Narain v. Ram Sarup*, 1930 (All.) 467, 123 I. C. 820; *Jamun v. Nand Lal*, 15 (All.) 1; *Nanu Bhai v. Natha*, 7 Bom 414; and *Subramaniam v. N. P. L.*, 103 I. C. 48, Mad.), though opposite view was taken in *Manjunatha v. Devamma*, 26 Madras 186. The matter has been set at rest by the Privy Council in *Bishun Chand v. Girdhari Lal*, 1934 (P. C.) 147, 150 I. C. 6, reversing, the decisions of the Allahabad High Court reported in 1932 (All.) 461 140 I. C 783. It has been held that even such accounts would be mutual and therefore balance would be "account stated," as "the essences of

are given at the foot of the plaint (or, are appended to the plaint, and the plaintiffs pray that they may be treated as part of the plaint).

4. The mutual account between the parties has been kept according to the year of the English calendar, and the last entry in the aforesaid account was that of April 10, 1923.

5. On May 30, 1923, Ramlal, the managing proprietor of the defendants' shop came to the shop of the plaintiffs, and, after going through the accounts on each side, agreed that there was a balance of Rs. 2,462 in favour of the plaintiffs. The said balance was entered by the same Ramlal, on page 8 of the plaintiffs' *Khata Babi*, and was duly signed by him.

6. The defendants have not paid the amount or any part thereof, and the plaintiffs claim it either as balance due on the original account or, in the alternative's balance found due to the plaintiffs on account stated between the parties.

"account stated" is not the character of the items on one side or the other; but the fact that there are cross items of accounts and that the parties mutually agree to the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side *protanto*, go on to agree that the balance only is payable." The rule does not depend on the character or the origin of the debits or credits on either side.

"Account Stated" furnishes a distinct cause of action for a suit, and fresh time of three years is allowed from the date of such account, if made in writing and signed by the defendant or his duly authorised agent or, if there is a simultaneous agreement in writing and signed as aforesaid making the debt payable at a future date, then from such future date (Art. 26), even though some of the items were time-barred when the account was made and a suit for them would not have been maintainable independently, (*Asbby v. James* (1843), 11 M. & W. 542; *Ram Lochan v. Ram Narain*, 167 I. C. 652, 1937 (Pat.) 348; *Nabendra-nath v. Shasibindu*, 1941 (Cal.) 395; *Bishun Chand v. Girdhanlal*, 1934 (P. C.) 147—cases decided with reference to Lim. Act, 1908, Art. 64.). But if the account stated is not signed, the plaintiff can succeed only in respect of such items as are within the ordinary period of limitation, as Art. 64 or Art. 26 would not apply (*Thakurya v. Sheo Singh*, 2 A. 872). Strictly speaking, an "account stated" should extinguish all previous demands and the only suit that could be brought should be on the account stated, but it has been held in some cases that an "account stated" does not itself extinguish or supersede or alter the previous debts (*Fidgett v. Penny*, 1 C. M. and R. 108; *Smith v. Page*, 15 M. and W. 683; *Bhatu Das v. Mt.*

The Plaintiffs claim—

(1) Judgment for Rs. 2,462 principal and Rs. 881 interest; and

(2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 10—Similar suit between principal and a Commission agent

1. In the month of *Baisakh* 1979 *Sambat* (corresponding to.....), at Delhi it was verbally agreed between the plaintiff and the defendant that the plaintiff would act as the *pucca arhtia* or commission agent of the defendant in Delhi on *inter alia* the following terms and conditions :—

(a) That the plaintiff would supply to the defendant cloth, silver, gold, lace, *gota* and general stores and the defendant would pay to the plaintiff the value thereof and the charges as stated below.

Bibi, 63 I. C. 280 Pat.). It is sometime safer to base a claim alternatively on the original accounts and the account stated, for, if the plaintiff fails to prove the former, or any flaw is found in the latter, the suit may not fail. But the suit on original account can be brought only subject to its being within limitation. There is a broad distinction between the position where an account is rendered and where an account is stated or settled. In the former case the accounting party must satisfy the Court that the account was correctly rendered but in the latter case the person entitled to an account is bound by the account unless it can be reopened. (1952 Nag. 135).

Suits on Balance : If a balance struck is “not an account stated” but a mere acknowledgment of the correctness of the creditor’s account it cannot form the basis of suit, which should be brought on the original transactions (*Gaya Prasad v. Ram Dayal*, 23 A. 502; *Shanker v. Mukta*, 22 B. 513; *Dukhi v. Mahomed*, 10 C. 284; *Reotiram v. Lachman*, 23 A. L. J. 900, 1926 (All.) 155, 89 I. C. 402; *Deodat v. Mahraj Lal*, 1928 (Oudh) 529), unless it is accompanied by a promise to pay and the acknowledgment of balance cannot be pleaded except to save limitation, though it may be proved at the trial to show the truth of the plaintiff’s claim. The High Court of Lahore held that proof of striking balance by the defendant is sufficient to throw the *onus* on the defendant to explain why he did so and, in the absence of that explanation, plaintiff is entitled to a decree (*Muhammad Bakeb v. Shadi*, 100 I. C. 60, 27 P. L. R. 768, 8 Lah. 123, A. I. R. 1927 (Lah.) 272). But if the acknowledgment is accompanied by a promise to pay, it becomes a new contract on which a suit can be brought (*Marimuthu v. Saminatha*, 21 M. 366; *Sheogobind*

Name of Commodity		Charges	
Cloth	Commission	at	-/14/-p.c.
	Dharmada	at	-/1/-p.c.
	Gaushala	at	-/-/3p.c.
	Shagirdi	at	-/1/-p.c.
	Cooly and cart charges	at	-/1/6per package
	Iron hoops	at	3/12 -per package
	Sewing charges	at	-/6/-per package
Gold and silver	Commission	at	-/4/-p.c.
Lace and <i>gota</i>	„	at	-/6/-p.c.
General stores	„	at	-/12/p.c.
	Dharmada	at	-/1/-p.c.
	Gaushala	at	-/-/3p.c.
	packing and forward- ing charges	at	actual

v. *Jai Sri Singh*, 130 I. C. 503, 8 O. W. N. 126, 1931 (Oudh) 97). The promise may be oral or in writing, but if the acknowledgment is of a barred debt, the promise must be in writing (Sec. 25 (3), Contract Act). It is not necessary that in the writing itself the consideration is described as past debt so long as it was such debt and was known to the debtor as such. (*Kastur Chand v. Manak Chand*, 1943 (Bom.) 447). In this case the debt which was undoubtedly a time-barred debt was described as a cash loan. The promise need not be express but it may be implied from the writing or from conduct (*Bajranglal v. Anandi Lal*, 1944 (Nag.) 124). The Bombay and Lahore High Courts and the Ajmer Court have, however, *held*, that an acknowledgment of the correctness of balance always implies a promise to pay and a suit can be based on it (*Chunilal v. Laxman*, 23 Bom. L. R. 606, 63 I. C. 923; *Belgaum Bank v. Bandu*, 1945 (Bom.) 359; *Gopal Das v. Ramnath*, 124 I. C. 624; *Punjab Ram v. Jowaya*, 1933. Lah.) 47, 141 I. C. 425; *Bai Shanta v. Trikamlal*, 1944 (Bom.) 19; *Ram Shah v. Lalchand*, 1940 p. c.) 63, 187 I. C. 233; *Ratan Lal v. Rajmal* 1939 A. M. L. J. 137; *Mohan Lal v. Ram Chandra*, 1939 A. M. L. J. 147). But it has been held in Oudh and Nagpur that the promise implied in acknowledgment cannot operate on a barred debt as it cannot be said to be in writing. (*Suraiya Begum v. Hamid Ali*, 1949 (Oudh) 48); *Shiva Ram v. Gulab Chand*, 1941 (Nag.) 100, 194 I. C. 806; *Ganeshprasad v. Must. Rambali*, 1942 (Nag.) 92). But if there is a promise to pay interest, it will be sufficient as that implies a promise to pay principal also (*Tulsiram v. Zaboo Bhima Shanker*, 1949 (Nag.) 229). The Ajmer Court has in the case above noted gone to the length of holding that promise referred

(b) That the plaintiff would sell the commodities sent by the defendant to him and would credit the sale-proceeds to the defendant and would be entitled to the following charges in respect thereof :—

Commission	at	1/4/-p.c.
Brokerage	at	-/-/6 per md.
Dharmada	at	-/1/-p.c.
Gaushala	at	-/-/3 p.c.
Weighment and cooly charges	at	1/-/-per md.

(c) That the defendant would pay to the plaintiff all other usual and incidental charges and expenses beside the charges mentioned above.

(d) That the plaintiff would, at his discretion, advance sums of money, and supply articles of personal use, to the defendant and the defendant would repay the money so advanced and pay the price of articles supplied.

to in Section 25 (3) Contract Act may even be an implied promise and as the acknowledgment from which the promise is implied is in writing, the case must be regarded as one of promise made in writing. This, it is submitted, is not a correct view. The promise referred to in S. 25 (3) must be an express one. The same view has been held by the Madras H. C. (*Govinda v. Achuttan*, 1940 (Madras) 678, 1940 M. W. N. 443).

Two cases were decreed by the Allahabad High Court in which the suits appeared to have been brought on balances struck, but that was not because a suit merely on a balance or acknowledgment was held to be maintainable, but a point was stretched and the facts that there was a general reference to old accounts and that the plaintiff had given evidence of it were held to be sufficient indications of the plaintiff's intention to sue, not on the balances, but on original account (*Bholanath v. Net Ram*, 3 A. L. J. 800; *Kallu v. Bhagirath*, 40 I. C. 58). The headnote of 40 I. C. 58 is misleading. Similar was the case of *Ganpat Rai v. Nihal Devi*, 89 I. C. 366, A. I. R— 1926 (Lah.) 160. But the plaints in all these cases were bad according to the principles of pleading, as they did not contain particulars of the old accounts, and as it is not always easy to persuade courts to condone such defects in pleading, these cases should not be regarded as precedents.

When, therefore, there has been no fresh promise to pay, a suit should be brought, not on the balance, but on original transactions which should be pleaded with particulars, and the striking of balance need not be pleaded, except when necessary for extension of the period of limitation. If a suit is brought on the balance and the new promise

(e) That one account would be kept of all the dealings and transactions between the parties.

(f) That the account would be adjusted in Delhi at the close of every *Sambat* year and the dues of the plaintiff would be paid in Delhi.

(g) That the plaintiff would send from time to time to the defendant accounts of the dealings and transactions, and if no objection be raised by the defendant within a month of the receipt of any account the same should be treated as correct.

(h) That interest on all dues would be paid at- 10 - p. c. p.m. compoundable every year.

2. That business between the parties commenced from *Jeth Badi* 1978 and continued up to *Bhadon Badi* 2, 1984 on the aforesaid terms. Particulars of the account between the parties are given in the account appended to the plaint which should be considered as part hereof. The last item in the account is of date *Bhadon Badi* 2, 1984, (corresponding to.....).

3. Accounts were adjusted from time to time. The last of such adjustments took place on *Bhadon Sudi* 13, 1984 (corresponding to) and the sum of Rs. 6,954-12-3 was found due by the defendant to the plaintiff. The defendant acknowledged in writing his liability to pay the same with interest. The said acknowledgment was endorsed on the plaintiff's *Khata Babi* at Page 8 and was signed by the defendant.

4. According to the account appended to the plaint, as well as according to the account stated referred to in

both should be alleged with sufficient particulars. When there is an "account stated," or a balance made and signed by the debtor and an agreement to pay it endorsed under the balance, in the course of large dealings, it is unnecessary to plead the account or transactions previous to such account stated or striking of balance, but the latter alone need be pleaded along with subsequent transactions. A suit may be based in the alternative on such new contract and on the old transactions.

A balance of account, or account stated, written in the creditor's book and signed by the debtor should be stamped with 25 nP. stamp,

para. 3 of this plaint there is now due and owing by the defendant to the plaintiff the sum of Rs. 6,954-12-3 for principal and Rs. 182-11-6 for interest, total Rs. 7,137-7-9 which or any portion whereof the defendant has not paid.

The plaintiff claims—

- (1) Judgment for Rs. 7,137-7-9.
- (2) Interest from date of suit to date of payment at such rate as the court thinks reasonable.

No. 11—Suit for reopening account

1. The plaintiff owns several business shops and other estates in Mussoorie which are specified in Schedule A appended to the plaint and the defendant is a house agent.

2. By an agreement in writing contained in his letter dated the 20th October, 1940, to the defendant, the plaintiff appointed the defendant as his house agent at Mussoorie. It was agreed that the defendant would realize the rent of the said houses, shops and other estates and after defraying the necessary expenses of repairs, taxes and cost of establishment and deducting his own commission at 5% on rents and 5% on the cost of repairs, would pay the balance to the plaintiff. It was also agreed that he would submit accounts of receipts and expenditure annually in the month of January.

3. On the 15th January, 1942, the defendant submitted a statement of account for the year 1941 and the plaintiff accepted the said statement of account without scrutiny.

as an “acknowledgment,” if the balance exceeds Rs. 20, and the intention of the writing is to supply evidence of the debt, but if the intention is only to admit the correctness of the balance it will not amount to “acknowledgment.” If the intention is merely to extend limitation, even then it will not require a stamp (*Pachkodi v. Krishnaji*, 1947 (Nag.) 145; *Culia Manilal Moti Ram v. Natworlal Gokuldas*, 1947 Bom. 337, 49 Bom. L. R. 81). Where a promise to pay it, or to pay interest, is also expressly added, the entry always requires to be stamped as a bond or promissory note (*Prabhad v. Bhagwan Das*, 100 I. C. 593). As an unstamped acknowledgment or promissory note cannot be admitted in evidence even on payment of a penalty, it should never be made the basis of a suit, otherwise the suit will necessarily fail. An acknowledgment,

4. The plaintiff has lately discovered that there are various fraudulent entries and omissions in the said statement of account. The false entries and omissions so far discovered are detailed below :—

- 1.
- 2.
- 3.
- 4.

The plaintiff claims—

(1) That the said account be reopened : or that liberty be given to him to surcharge or falsify the items in the said account on the ground of fraud and for material error.

(2) Payment to the plaintiff of such sum as may be found due to him on the taking of accounts.

coupled with a promise to pay, if attested by a witness becomes a bond, and can be admitted in evidence on payment of stamp deficiency and penalty. If a suit is brought, not on the basis of a balance but on the original transactions entered in the plaintiff's *babi Khata*, the transactions alone, with particulars, need be pleaded. The *babi Khata*, entries supporting them need not be referred to in the plaint, as is generally done because that would be referring to the evidence of the claim. It is equally wrong to designate such suits as suits on the basis of *babi khata*. Such suits are either for money lent or for the price of articles delivered and *babi khata* is only evidence of them.

Limitation is governed by Art. 26.

Defence : In India balance written in plaintiff's *babi* and signed by the defendant is not always stamped. Want of stamp, if the balance is over Rs. 20 is an excellent defence to a suit on the balance. The defendant may plead that the balance was wrong as there were substantial mistakes, in the items, but he should give particulars of such mistakes or he may show the plaintiff's fraud in inducing him to believe that the items were correct, e.g., that the rates entered in the account-books were wrong and different from the market rates, as it is always permissible to reopen even a settled account, if mistake or fraud is shown (*Bhagwan v. Damodarji*, 42 A. 230, 59 I.C. 20, 18 A. L. J. 100; *Baney Madhub v. Subal*, 11 C. W. N. 776; *A Rahim v. H. V. Law*, 3 R. 1. 1925 (Rang.) 210 *Jaigovind v. Mt. Hiria* 1941 (Pat.) 433, 196 I. C. 220) Grounds for reopening the account must be specified or substantial mistakes or fraud should be alleged, mere unreasonableness of certain items is not fraud (*Bajranglal v. Anandilal*, 1944 (Nag.) 124). He may show that there was no consideration for the transactions for which the account was stated, or that it was illegal or that the agreement was void, e.g., that the transactions were wagering contracts. It is not ne-

AGENT (d)**No. 12—Suit by an agent for his commission**

1. By an agreement in writing, dated January 22, 1924, the defendant appointed the plaintiff as his agent for sale of an estate known as the Chandala Estate and agreed to pay to the plaintiff as his commission, 5 per cent on the price received by the defendant for the said estate in the event of the plaintiff introducing a purchaser acceptable to the defendant.

2. The plaintiff accordingly introduced one Ram Bihari Lal as a purchaser of the estate for a price of Rs. 5,00,000. A sale-deed was executed by the defendant in favour of the said Ram Bihari Lal, in respect of the estate, and the said Ram Bihari Lal paid Rs. 5,00,000 in cash to the defendant at the time of registration of the sale-deed, on April 28, 1924.

3. The defendant has not paid the commission due to the plaintiff under the terms of the agreement of January 22, 1924, or any part thereof.

The plaintiff claims judgment for Rs. 25,000 and interest from date of suit to that of payment at such rate as the court may deem reasonable.

No. 13—Suit against del credere agent for price of goods

1. By an oral agreement made on the 2nd March, 1937, the plaintiff appointed the defendant his agent for the sale of plaintiff's books upon the terms that he would be

cessary to reopen a settled account that fraud should be shown. It is sufficient if errors of sufficient magnitude and in sufficient number can be shown (*Bachbey v. Gundoo*, 1933 (Oudh) 557). But it is no defence that there was a subsequent account stated showing a balance in defendant's favour. In such a case a definite plea of payment should be raised. That there are other unsettled accounts between the parties is also no defence (*Ram Nath v. Pitamb Deb*, 34 C. 733, 21 C. W. N. 632, 31 I. C. 430).

(d) Secs.—211-225 of the Contract Act lay down the duties of a principal to his agent and of an agent to his principal. Any breach of

paid 15 per cent commission on all sales, and that he would be responsible to the plaintiff for the discharge by the buyers of their contractual obligations.

2. Between the 2nd March, 1937 and the 18th May, 1938, the plaintiff under instructions from the defendant delivered books to various buyers but the buyers have not yet paid the price. The names of the buyers and the books sent to them, with the dates on which they were sent respectively and also the price are mentioned in the Schedule appended at the foot of the plaint.

3. As per statement in the schedule at the foot of the plaint a sum of Rs. is due to the plaintiff.

The plaintiff claims Rs. with interest from date of suit to that of realization at 6% per annum.

No. 14—Suit against an agent for disregarding instructions

1. By a letter, dated December 20, 1923, the plaintiff employed the defendant as his commission agent to purchase, at Kiratpur market, 200 maunds of best white sugar at a price not exceeding Rs. 20 per maund, and to despatch the same to the plaintiff at Multan. The plaintiff had also expressly notified to the defendant, by the same letter, that there was no market at Multan for any but the best white sugar, and therefore the defendant should not send any but the best white sugar.

2. The defendant, although he could easily have purchased for plaintiff, at Kiratpur market, 200 maunds of best white sugar within the said limit of price, neglected to do so. He purchased for the plaintiff 200 maunds of

any such duty furnishes cause of action for a suit even though no fraud is proved. In every suit between principal and agent, **facts and particulars showing how and when the relation of principal and agent arose should be set out in the plaint.** All the terms of the agency need not be set out, but only those which are material to the case should be alleged. **The breach of statutory or contractual duty which is the cause of action for the suit should be definitely alleged.**

sugar of much inferior quality at Rs. 18 per maund and despatched the same to the plaintiff.

3. The plaintiff has suffered damage to the extent of Rs. 400.

Particulars : After defraying all expenses, the plaintiff would have made a profit of Rs. 2 per maund (or Rs. 400 in all) by the sale of the best white sugar at Multan. With great difficulty he has been able to sell the sugar sent by the defendants at the cost price and thus the plaintiff did not make any profit.

The plaintiff claims Rs. 400 as damages, with interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 15—Suit for breach of contract alternatively against a principal and an alleged agent

1. On the 1st March, 1938, defendant No. 2 orally represented himself to be the agent of defendant No. 1 for the purchase of wheat and thereby induced the plaintiff to sell to the defendant No. 12,000 bags of wheat (each containing $2\frac{1}{2}$ mds.) at Rs. 5 per md. and it was agreed that the said bags would be taken delivery of at the plaintiff's godowns in Hapur Mandi on payment of the price on or before the 15th May, 1938.

2. Defendant No. 2 by his said representation impliedly warranted his authority to buy the said goods from the plaintiff on behalf of defendant No. 1 and the plaintiff entered into the said contract of sale of wheat on the faith of such warranty.

3. Neither of the defendants took delivery of the bags of wheat or paid the price. On the 15th May, 1938, the plaintiff wrote to the defendant No. 1 offering delivery of

As no consideration is necessary to create an agency (Sec. 185, Contract Act), it is not necessary to allege the consideration in the plaint, unless it is material to the suit. For example, in a suit for damages against an agent for not using due care and diligence, or for disregarding instructions, it is not necessary to allege the commission fixed, but in a suit by an agent for recovery of the commission, it would be necessary

the said goods and demanding the price thereof. Defendant No. 1, however, denied that he had authorized defendant No. 2 to buy the goods from the plaintiff and refused to take delivery or pay the price of the goods.

4. By reason of the premises the plaintiff has suffered damages.

Particulars

Contract price of 2,000 bags	Rs. 25,000
Price on the 15th May, 1938 at Rs. 4/- per md. ..	Rs. 20,000
Difference ..	Rs. 5,000/-

5. The plaintiff claims Rs. 5,000 as damages from defendant No. 1 if it is found that defendant No. 2, was his agent to buy the wheat from the plaintiff, and alternatively from defendant No. 2 in case it is found that he was not the agent of defendant No. 1.

to allege what commission was fixed by the contract. Even if an agent is appointed to enter into wagering contracts on behalf of his principal the contract of agency is not void, and the agent can, therefore, recover his commission and can be indemnified for any loss he has suffered (*Sobhagmal v. Mukund Chand*, 1926 (P. C.) 119, referred to in *Ram Prasad v. Ramjilal*, 25 A. L. J. 736; *Perosha v. Monekji*, 23 B. 899; *Bankeylal v. Bhagirath*, 1939 A. W. R. (H. C.) 819, 1939 A. L. J. 1073, 1940 (All.) 95, 186 I. C. 511; *Gopaldas v. Manik Lal*, 1941 (Cal.) 125, 193 I. C. 603). Even if loss is incurred in the wagering contracts and the agent has actually paid it to a third person he can recover it from the principal (*Shibbomal v. Lachman*, 23 A. 165), but in such cases, he should definitely allege in the plaint not only the loss, but the fact of his having paid it. If profit results from the transaction and it is realized by the agent, he is liable to pay it to the principal (*Hardeo v. Ram Prasad*, 25 A. L. J. 223; *Nagendrabala v. Gurudoyal*, 30 C. 1011). In case of misconduct or negligence the principal can sue for damages, and this is in addition to for forfeiture of commission (*Vasanta v. Gopala*, 1939 M. W. N. 1046) (2).

The position of a broker is that of an agent. A broker engaged to purchase shares stands for his principal to purchase the shares. When a man is authorised to do a certain act it must necessarily be presumed that he has been authorised to do all such act as must be performed to complete the transaction. 1951 Hyd. 47-6 D L. R. 28 (Hyd.).

Agent when personally liable.

It is obvious that an agent is not personally bound by a contract entered into on behalf of disclosed principal in the absence of a contract

No. 16—Suit by an agent for money paid on behalf of the principal

1. The plaintiff carries on business as a commission agent at Delhi, and the defendant carries on a grain business at Rohtak.

2. The defendant, by his letter dated October 25, 1924, appointed the plaintiff as his commission agent for the purchase and sale of grain under the instructions of the defendant and, by the same letter, agreed to pay a commission of annas 12 per cent on every transaction of purchase and sale, and in rest on any sum spent by the plaintiff for the defendant at 10 annas per cent per mensem (or agreed to pay the "usual" commission and interest, and the usual and customary rate of commission on such transactions then was 12 annas per cent and the customary rate of interest was 10 annas per cent per mensem).

3. The defendant, by the said letter, also instructed the plaintiff to purchase for him, 200 bags of wheat and to keep them with the plaintiff until further orders.

to that effect; but every agent who undertakes personal responsibility for payment is personally liable and can be sued in his own name on the contract unless the other contracting party elects to give exclusive credit to the principal (*Babu Lal v. Jagat Narain*, 1952 V. P. 51). He is also liable for money received on behalf of his principal, even if the moneys are received as fruit of a void and illegal contract. (*Murlidhar v. Kishori* 1900 Raj. 296).

On a contract both principal and agent cannot be sued in the same suit— (*Nicholas Schivas v. Nemazie*, 1952 Cal. 859).

Limitation for most of the suits between principal and agent is three years, under one of the following articles —1, 2, 3, 4, 23, 55— Where the suit is based on breach of a term of an agreement which is registered, limitation would be three years under Article 55. It has been held in *Azam Ali v. Shamsber*, 106 I. C. 35, 1 Luck. 587, that where plaintiff had advanced money to defendant for purchase of a horse, and, on the defendant purchasing a mare and plaintiff refusing to take it defendant agreed to return the amount on selling the mare, the suit for recovery of the money advanced after the sale of the mare by defendant was governed, not by the three years' rule, but by Art. 120 of the old Act, corresponding to Art. 113 of the new Act. To suits for misappropriation Article 3 applies and not article 4, as "misconduct" referred to in the latter does not include everything that may in ordinary parlance be called "misconduct" but means only misconduct of the agent in the business of the

4. The plaintiff purchased the said quantity of wheat for the defendant at a cost of Rs. 3,260, particulars of which are given in the account at the foot of the plaint.

5. The defendant by letter, dated November 30, 1924 instructed the plaintiff to sell the said 200 bags of wheat at the marker rate. The plaintiff sold the said bags of wheat and realised Rs. 2,700, as per account given below.

6. The defendant sent Rs. 300 to the plaintiff on November 4, 1924, and has not paid the rest, or any part thereof.

The plaintiff claims—

(1) Rs. on account of the balance of what he had to spend for the defendant, and his commission and interest as per account given below.

(2) Interest from the date of suit to that of payment.

Particulars of account

* * *

No. 17—Like suit by a commission agent in respect of khatti transactions

1. The plaintiff has an *arbat* shop at Shamli and deals in the purchase and sale of *khattis* or grain-pits as commission agent of others.

2. The custom of the market at Shamli, with regard to the purchase of *khattis*, is, that the purchaser pays to the agent, through whom he makes the purchase, Rs. 200 per *khatti* of wheat and Rs. 150 per *khatti* of gram as advance money, that if the agent finds the market going down and loss on the transaction imminent, he is entitled to call upon his principal (the purchaser) to deposit more advance money as security against loss, and in case the principal fails to

agency (*Kinattinkara v. Manavikrama*, 109 I. C. 332, 1928 (Mad.) 906-decided with reference to Arts. 89 & 90 of the old Act). A Savings Bank clerk of a bank has been held to be the bank's agent and if he misconducts himself and the bank suffers loss, the bank's suit was held to be governed by Art. 90 (*The Benares Bank v. Ram Prasad*, 1930 A. L. J. 1153). If the agent sends account to his principal and admits certain

comply with the demand, the agent is empowered to sell the *khattis* at the market rate, and to recover from his principal any loss he has in consequence to pay on his behalf. It is also the custom of Shamli market that on *khatti* transactions the principal pays to his commission agent commission at 12 annas per cent, brokerage at 2 annas per cent, charity at 3 nP. per cent and *gaoshala expenses* at 2 nP. per cent, contribution to school at 2 nP. per cent, and servant's expenses (*shagirdi*) and correspondence expenses, each at 4 annas per *khatti*. It is also the custom of the Shamli market that the commission agent receives interest on money spent on behalf of his principal, and pays interest on money realised, at 10 annas per cent per mensem.

3. On *Sawan Sudi* 4, 1979 (corresponding to July 28, 1922) the defendant purchased through the plaintiff 2 grain-pits of wheat at 6 seers $6\frac{3}{4}$ ch. per rupee and 2 of gram at 7 seers 8 ch. per rupee, each weighing 240 maunds, from Sada Sukh, and deposited Rs. 700 as advance money.

4. At the time of the aforesaid purchase, the plaintiff had verbally informed the defendant that the purchase would be subject to the conditions of the custom mentioned in para. 2 above, and the defendant had expressly agreed to all those conditions. The plaintiff bases this claim alternatively on the said custom or on the verbal agreement alleged in this pragraph.

5. The rate of wheat and gram began to fall soon after the aforesaid purchase and on *Bhadon Sudi* 15, 1979 (corresponding to September 6, 1922), the rate of wheat was 7 seers 12 ch. and that of gram 10 seers 12 ch.

6. On the said *Bhadon Sudi* 15, 1979, the plaintiff sent by registered post, a notice to the defendant calling upon

sum to be due from him a suit for sum was held to be governed by Art. 64 of the Act of 1908 (corresponding to Art. 26 of Act of 1963). (*Lachminarain v. Murlidhar*, 1937 Cal. 535).

Defence : In an agent's suit the principal may plead that the agent acted in disregard of his instructions, or that he acted on his own account in the business of the agency and that therefore the defendant is entitled

him to send more advance money and expressly notifying to him that in case of non-compliance with the demand within one week of the receipt of notice, the plaintiff would sell the *kbattis*. This notice was delivered to the defendant on September 8, 1922.

7. No reply was received from the defendant and the plaintiff then, on September 20, 1922, sent a reminder through a special messenger Ram Sukh, a servant of the plaintiff.

8. On this, the defendant sent his *mumim* Mutsaddi Lal on September 25, 1922, the said Mutsaddi Lal asked the plaintiff, on the defendant's behalf, to sell the *kbattis*.

9. The plaintiff sold the *kbattis* to Ram Bilas at the market rate on September 25, 1922, i.e., wheat at 7 seers 14 ch., and gram at 10 seers 14 ch., per rupee.

10. Alternatively, if it be not proved that the said Mutsaddi Lal instructed the plaintiff to sell the *kbattis*, or if it turns out that Mutsaddi Lal had no authority on behalf of the defendant to give such instructions, the plaintiff states that the sale by him was in exercise of his power under the custom alleged in para. 2, or under the verbal agreement referred to in para. 4 of this plaint.

11. The plaintiff has paid Sada Sukh the price of the *kbattis* on behalf of the defendant, and after deducting from the same the sum the defendant paid as advance and that realized by sale of the *kbattis*, Rs. is due to the plaintiff from the defendant.

Particulars of the account are given at the foot of the plaint, (or, are appended to the plaint, and the plaintiff prays that the same may be treated as part thereof).

The plaintiff claims Rs. , with interest from the date of suit to that of payment.

to repudiate the transaction (Section 215 Contract Act). If the suit is for recovery of what the agent had to pay on behalf of the principal on account of wagering transactions, the defendant may show that the plaintiff entered into the contracts with the defendant on his own account and not as an agent. In a suit for remuneration by the agent the principal may plead that the business of the agency has not yet terminated or

No. 18—Suit against an agent for secret Commission received by him (impleading the person)

1. The plaintiff is, and at all material times was, the proprietor of the Flour Mill known as the Star Flour Mill situate at Meerut.

2. By an oral agreement made between the plaintiff and defendant No. 1 on the 3rd February, 1938, the plaintiff appointed the defendant No. 1 as his agent at Hapur for the purchase of wheat for the said flour mill and the terms of the said agreement were that before the beginning of the wheat season the defendant No. 1 would obtain tenders from sellers of wheat for delivery at the factory and pass them on to the plaintiff with his recommendation, the plaintiff would enter into contracts with the tenderers whose tenders would be accepted by him and the defendant No. 1 would be paid by the plaintiff a commission of 2 per cent on the price paid by the plaintiff for the wheat purchased by him from tenders obtained by the defendant No. 1.

3. On the 14th March 1938, defendant No 1, sent to the plaintiff a tender of defendant No. 2 for sale of 10,000 maunds of wheat at Rs. 5/- per maund and advised that the said tender be accepted.

4. The plaintiff accepted the said tender on the 25th March, 1938, acting on the advice of defendant No. 1, and entered into a formal contract with defendant No. 2.

5. Between the 15th April, 1937 and 20th May, 1938 the whole of 10,000 maunds of wheat was delivered by defendant No. 1, and the plaintiff paid him Rs. 25,000/- as price and on the first June, 1938 and paid defendant No. 1 Rs. 1,000/- as his commission.

6. On the 10th July, 1938, the plaintiff discovered that

that the agent has been guilty of misconduct (Sections 219, 220, Contract Act), e.g., that he made secret profits (*Harivallabh Das v. Bhai Jiwanji*, 26 B. 689). Particulars of the alleged misconduct must be given. To a suit for damages for breach of duty or negligence in the performance

before submitting his tender above-mentioned, defendant No. 2 with a view to induce defendant No. 1 to recommend his tender for acceptance by the plaintiff corruptly agreed to pay to defendant No. 1 a secret commission at the rate of -/4/- per maund on the quantity of wheat contracted to be purchased by the plaintiff and inserted in the tender a rate which was in excess of forward contract rate of wheat at the time in Hapur Mandi and of the rate at which defendant No. 2 would have himself otherwise tendered by 4 annas per maund. Defendant No. 1, was induced by the said secret commission or bribe to recommend the tender of defendant No. 2 to the plaintiff.

7. The price paid by the plaintiff to defendant No. 2 for the said wheat exceeded by a sum of Rs. 2,500/- the price which the defendant No. 2 would have received had it not been for the payment of the secret commission.

8. Defendant No. 1 has secretly and corruptly received the said commission of Rs. 2,500 - from defendant No. 2 on the 25th May, 1938.

The plaintiff claims Rs. 2,500/- from the defendants.

No. 19—Like Suit against agent alone

1. On September 4, 1924, the plaintiff verbally employed the defendant as his agent to buy furniture for him on commission.

2. The defendant as such agent, bought for the plaintiff, furniture worth Rs. 2,000 from Abdul Ali, furniture merchant of Bareilly, on September 20, 1924, and, in effecting such purchase, secretly and corruptly received for himself, from the said Abdul Ali a commission of Rs. 200, which he has not paid over to the plaintiff.

of duty it is no defence that the defendant's motives were untainted with fraud (*Richard Phillip v. W. F. Barns*, 171 I. C.487, 1937 P. C.) 314 but to a suit on the ground of breach of instructions, agent may plead

The plaintiff claims Rs. 200, with interest from date of suit to that of payment.

No. 20—Suit against an agent for damages for not using due care and diligence

1. On June 14, 1923, the plaintiff employed the defendant as his paid *karinda* to collect rents from the tenants of village Barkatpur.

2. The defendant did not collect all the rents, and has conducted his work so negligently that the plaintiff has suffered damage.

Particulars :—

- (i) The defendant neglected to demand payment of Rs. 75 due for rent for 1328 Fasli from Raju tenant, and the claim for the said rent has become time-barred.
- (ii) The defendant neglected to realise Rs. 200 from Krishna tenant, who sold away all his movables and left the village, and the amount has thus been lost to the plaintiff.

The plaintiff claims Rs. 275, with interest from the date of suit to that of payment.

ASSIGNMENT (e)

No. 21—Suit by an assignee of a debt

1. The defendant No. 1 borrowed Rs. 200 from defendant No. 2 on a bond dated October 25, 1922, and agreed

that his acts were the acts of a prudent man and were performed at a time of emergency (*Har Kishen v. National Bank*), 1940 (Lah.) 412.

(e) An assignment of a debt or other "actionable claim" is valid and the assignee can sue for it in his own name, even if it is an assignment of part of a debt (*Travancore N. Bank Co. v. T. N. Q. Bank*, 1939 M. W. N. 1054), but an assignee of a part cannot sue for that part only, he must sue for the whole (*Tulsiram v. Firm Gianchand etc.*, 1940 (Lah.) 96;

to repay the loan, with interest at 1 per cent per mensem, within six months of the date of the bond.

2. The said defendant No. 2 assigned the debt due under the said bond from the said defendant No. 1 absolutely to the plaintiff by a sale-deed dated April 20, 1925

3. The defendant No. 1 has not paid the debt due from him or any part thereof.

The plaintiff claims—

(1) Judgment against defendant No. 1, for Rs. 200 on account of principal, and Rs. 72 on account of interest up-to the date of suit

(2) If the said defendant No. 1 proves that he has paid

Mohanlal v. Bala Bux, 1940 (Lah.) 279, 189 I. C. 253). To such a suit, the assignor is not a necessary party (Sec. 130, Transfer of Property Act), though as a matter of practice, he is usually impleaded as a *Pro-forma* defendant, but where the plaintiff is assignee of a part of the debt, the assignor or transferees of other part must be impleaded (*Firm Ram Kishen v. Firm Gurdial*, 1941 (Lah.) 337; *Murlidhar v. Rikhi Ram*, 43 P. L. R. 444). But if no notice of assignment, as provided by Sec. 131, is given to the debtor, and the debtor was no party to the assignment, he can pay the debt to the assignor in spite of the assignment. In such cases, if there is a suspicion that the assignor has realised any portion of the debt or the debtor has given out that he has paid it to the assignor, it is always better to implead the assignor also as a defendant and to claim from him whatever may be found to have been realised by him. If a plaintiff has to implead the assignor and to claim this relief from him, by reason of the debtor's allegation of payment to the latter, and no such payment is established, the debtor, and not the plaintiff, should be made liable for the costs of the assignor. The promisee of the promissory note who endorsed it to the plaintiff is a necessary party to the suit for recovery of the dues under the note from the promisor. *Thambusami Reddiar v. Savarimutham*, 1954 Mad. 960).

The Madras High Court has held that even after assignment the assignor can still sue (*Diyyadaru v. Arigapudi*, 104 I. C. 409, 53 M. L. J. 427); but this view is, it is respectfully submitted against the provision of the first para. of Sec. 130, Transfer of Property Act.

An "actionable claim" can be transferred only by a written instrument which need not be registered, but a negotiable instrument may be transferred by endorsement. The form of endorsement will decide whether only the pronote has been transferred or also the debt. In the former case assignee cannot sue on debt. (*Mohd. Sharif v. Abdul Rahman* A. I. R. 1966 Mad. 50). In the Punjab where the T. P. Act

any part of the said sum to the said defendant No. 2, judgment for the said amount with interest from the date of such payment to the date of suit at 1 per cent per mensem against defendant No. 2.

(3) Interest from date of suit to that of payment at such rate as the court deems reasonable.

No. 22—The Like, when the assignment was of sum due and of other money to become due in future

1. By a contract in writing dated June 20, 1924, it was

did not apply oral assignment of pronote has been held valid (*Brijlal v. Dhanna*, 164 I. C. 271, 1936 (Lah.) 547). As T.P. Act does not apply to transfers by order of Court, assignment by Judge of a security given under the G. & W. Act does not require a written instrument and judge's order may be construed as a valid assignment (*Smt. Mani Devi v. Smt. Anpurna*, 1943 (Pat.) 218, 206 I. C. 226). A debt secured by mortgage of immovable property, or by hypothecation or pledge of movable property, not being an "actionable claim", can be transferred in the way in which any other property can be transferred. Right to recover a partner's share in a partnership is an actionable claim (*Pulchand v. Shamdas*, 1941 (Sindh) 731). An order for payment of money is not an assignment (*Kishan Gopal v. L. J. Bavin*, 1926 (Cal.) 447, 42 C. L. J. 43, 89 I. C. 735), nor does a deposit of a cheque amount to an assignment (*D. B. Ballabhadras v. Seth Narain Prasad*, 1926 (Nag.) 206). The particular mode of transfer should be specified in the plaint and, if the transfer was by a writing the writing must be identified. It should be stated whether the assignment was absolute or by way of security for a loan.

But a transferee of a *mere right to sue* (not amounting to an actionable claim) cannot maintain a suit, as such transfer is legally void (Sec. 6, Transfer of property Act) e. g. a right to sue for unliquidated damages as means profits, or for compensation for a tort is not transferable (*Abu v. Chunder*, 36 C. 345; *Hirachand v. Nemchand*, 47 B. 719; *Gopala v. Gopala-swami*, 22 M. L. J. 207, 10 I. C. 320; *Prag v. Fatechand*, 5 A. 207; *Niadar v. Mukhtar*, 17 A. L. J. 837). But assignment of rent due under a lease (*Chidambaram v. Doraiswamy*, 31 I. C. 473 Mad.) or of profits of a village already occurred due (*Bharat Singh v. Binda*, 5 O. L. J. 398, 47 I. C. 634) is valid.

An agreement specifying a future fund for payment may amount to an equitable assignment and give the assignee preference over other creditors P. *Venkat Rao v. M. Chinna Vankatna* pully A. I. R. 1965 A. P. 410.

The Supreme Court held that an endorsement on the bill for realisation of the amount coupled with power of attorney amounted to an equitable assignment and for that reason the attachment of the amount of the bill by another creditor was not upheld. (*Bharat Nidhi v. Takhat Mal*-A. I. R. 1969 S. C. 313).

agreed between the defendant and one Murad Ali that the said Murad Ali should construct, for the defendant, a shop in the New Mandi at Muzaffarnagar according to a plan which is embodied in the said agreement, for a sum of Rs. 5,000 to be paid by the defendant to Murad Ali as follows :— Rs. 200 when the foundations have been filled up, Rs. 2,000 when the two outer rooms and verandahs have been constructed, and Rs. 2,800 on completion of the whole building.

2. The said sums of money were absolutely assigned to the plaintiff by the said Murad Ali, by a sale-deed dated September 21, 1924.

3. At the time of the said assignment, the said foundation had been all filled up, and Rs. 200 had become due to Murad Ali under the said agreement on August 20, 1924, and after the said assignment and before this suit, all the buildings have, according to the plan given in the said agree-

Transfer of an actionable claim in favour of a judge, legal practitioner or an officer of the court is invalid, and such transferee cannot maintain a suit (Sec. 136, Transfer of Property Act.). For example, if a pleader purchases property, and arrears of rent in respect thereof by a sale-deed, he cannot bring a suit for the arrears (*Hiralal v. Tripura*, 40 C. 650, 17 C. W. N. 679, 17 C. L. J. 438, 19 I. C. 129), or if an Honorary Magistrate purchases a bond (*Sitla Bux Singh v. Mahabir Pd.* 162 I. C. 229, 1936 (Oudh.) 275).

A contract of purchase and sale of goods is not a chose in action and is not assignable except with the consent of the other party to the contract, in which case it becomes an innovation of contract. Therefore an assignee of such a contract cannot sue for damages for its breach (*Tod v. Lachmidas*, 16 B. 441). But a debt due to the vendor's creditor and left by the vendor with the vendee for payment to his creditor but not paid to him may be assigned by the vendor (*Agrenath v. Ramratan*, 1938 (All.) 544, 177 I. C. 700, 1938 A. L. J. 851).

No notice of assignment is necessary to be given to the debtor, and if one has been given, it need not be alleged in the plaint. It can be proved, if necessary, in reply to the defendant's plea of payment to the assignor. To plead beforehand that, if the defendant has paid anything to the assignor, the payment does not absolve him from liability as he had been given notice of assignment would be "leaping before you come to the stile."

In a suit by an assignee, the date of assignment is some times mentioned as that of accrual of the cause of action for the suit. The assignment is no doubt part of the cause of action of the plaintiff, but the date

ment, been constructed and finally completed, i.e., the two outer rooms and verandahs had been completed on November 21, 1924, and the rest on July 20, 1925, and the said two further sums of Rs. 2,000 and Rs. 2,800 respectively have become due from the defendant under the said agreement.

4. The defendant has not paid the said sums or any part thereof.

The plaintiff claims—

- (1) Rs. 5,000 principal and Rs. 235 interest, calculated separately on the three sums from the dates on which each became payable, at the current rate of interest which is 12 per cent per annum (payable under the Interest Act.)
- (2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

on which the cause of action for the suit arises is the date on which breach is committed by the defendant, entitling the other party to bring the suit. For instance, in a suit for money due on a bond payable on demand instituted by an assignee of the bond, the date of the bond should be mentioned as that on which the cause of action arose.

Limitation is the same whether the suit is filed by the assignee or by the assignor.

Defence : Any defect in the form of assignment may be pleaded. It may be shown that the right was not assignable, e. g., that it was a mere right to sue, or that it offended against Section 136, Transfer of Property Act. The defendant may plead payment to the assignor, if he was not a party to the assignment and no valid notice of assignment was given to him. As an assignee takes subject to all the equities to which the assignor was subject, the defendant may claim any set off which he might have claimed against the assignor (Sec. 132). The defendant cannot plead that the assignment was without consideration (*Sathu v. Dagdu*, 9 Bom. L. R. 462; *Baldeo v. Behari*, 13 A. L. J. 19). He can, however, in a suit on a promissory note plead want of consideration for the assignment if he wants further to plead that the promissory note was itself without consideration, for he cannot raise the latter plea in a suit by an assignee for consideration (*Hazarilal v. Tulsiram*, 11 A. L. J. 481, 19 I. C. 637). He can, therefore, raise the latter plea only if he is prepared to raise the former. The Bombay High Court, however, allows the plea that the transaction was colourable and was intended to defraud the defendant (*Mulji v. Nathubhai*, 15 B. 1).

AWARD (f)

[23 & 24 * * *]

BOND (g)

No. 25—Suit on a simple money bond

1. On January 2, 1922, the defendant borrowed Rs. 500 from the plaintiff, and, in consideration of the loan, executed a bond agreeing to pay Rs. 500 on demand with interest at 12 per cent per annum, with half yearly rests (or, in consideration of Rs. 500 due to the plaintiff from the defendant on account of price of cloth purchased, the defendant executed a bond on January 2, 1922, agreeing to pay to the plaintiff, on or before April 2, 1922, the sum of Rs. 500, with interest at 12 per cent per annum.)

(f) Precedents Nos. 23 and 24 contained samples of plaints in suits to enforce arbitration awards. Such suits are now barred by reason of Section 31 of the Arbitration Act (X of 1940). These precedents have, therefore, been omitted.

(g) A bond may provide for payment of money by the obligor, either on demand, or at a certain specified time, or on the happening of a certain contingency. In England there are three kinds of bonds : (i) Single bond i.e., bond without any condition or penalty, such as ordinary simple money bonds found generally in India,—such bonds are now rare in England; (ii) Common money bond, under which a person borrowing, say Rs. 500 gives a bond for Rs. 1,000 agreeing that if he pays Rs. 500 and interest by a certain date, the bond would be void,—such bonds, are rare in India; and (iii) Bonds with specified condition such as annuity bonds or security bonds. Simple bonds for money borrowed, instalment bonds, security bonds, and annuity bonds are different kinds of bonds found in India. Hypothecation bonds will be dealt with under 'Mortgage'. In a suit to enforce any bond, **the fact of the due execution by the obligor, the passing of the consideration, the rate of interest, if any, and the terms, and the breach thereof which has given rise to the occasion to sue, must be stated in the plaint.** But no condition or term of the bond which is not necessary for the purpose of the suit need be stated. In case of an instalment bond **the due dates of the instalments, and if any have been paid, the actual dates and amounts of such payments should be given as particulars.** Where there is a condition of the whole becoming due in case of default in payment of any instalment, and the suit is brought after the expiration of the period of limitation from the date of the default, it is better to give the precise words of the bonds as to the condition of acceleration, so as to show whether the plaintiff was bound to sue for the whole on the occurrence of the default or the suit was optional. If the plaintiff has waived his right to enforce

2. The defendant has not paid the loan, or any part thereof (or, the defendant has paid Rs. 100 on February 2, 1923, Rs. 100 on May 3, 1923 and Rs. 100 on August 4, 1924, but has not paid the rest of the debt or any part thereof).

3. The Plaintiff claims—

(1) Rs. as per account given below.

(2) Interest from the date of suit to date of payment at such rate as the court may deem reasonable.

Account

* * *

No. 26—Suit on an instalment bond

1. On May 2, 1921, the defendant, in consideration of a loan advanced to him by the plaintiff, executed in favour of the plaintiff an instalment bond for Rs. 1,200, agreeing to pay the said amount in monthly instalments of Rs. 200 each on the day first of every month, beginning from July 1, 1921 (or, in the following instalments: July 1, 1921, Rs. 200; July 1, 1922, Rs. 200; July 1, 1923, Rs. 200; July

payment of the whole money, and he claims money payable on account of the unpaid instalments or brings a suit for the whole by reason of any subsequent default, **he must clearly allege the waiver in the plaint**, for, if no waiver is alleged, one will not be presumed from mere abstention to sue (*Baburam v. Jodha*, 11 A. L. J. 89; *Jadav v. Bhairab*, 31 C. 502; *Venkata v. Naidu*, 5 M. L. J. 241; *Kanhai v. Amrit*, 23 A. L. J. 424, 87 I. C. 927, 1925 (All.) 499). The burden of proving the waiver if denied by the defendant will be on the plaintiff. If the waiver was made by an express agreement between the parties the agreement should be pleaded in the plaint with all necessary particulars, as any other agreement. If the waiver is sought to be inferred from the plaintiff's conduct, such as that of accepting payment of overdue instalments, the plaintiff should give particulars of that conduct, along with the allegation of waiver of the benefit of the acceleration clause. For example, if the act of waiver relied upon is the acceptance of overdue instalments, those must be mentioned with particulars as to date, amount, etc. **Demand of payment** of money due under a bond is not necessary to be pleaded, even when the bond is payable on demand, for *a previous demand is not part of the cause of action*, and a suit cannot be dismissed merely on the ground that no such demand was made. If the defendant pleads that he did not pay the money as the same was not demanded, and he pays it into court, the question whether the plaintiff had made a previous demand or not can then be inquired into in order to determine whether

1, 1924, Rs. 200; July 1, 1925, Rs. 200; and July 1, 1926, Rs. 200). The defendant further agreed by the said bond that, in case default was made in the payment of any instalment, the whole amount then remaining due should at once become payable.

2. The defendant paid the first instalment on the due date. He did not pay the second instalment on the due date, but when he came to pay it three days later, i.e., on July 4, 1922, the plaintiff accepted the payment and verbally agreed to waive the benefit of the acceleration clause in the bond.

3. The defendant has not paid any other instalment, and the plaintiff, therefore, claims the whole amount under the acceleration clause by reason of default in payment of the third instalment.

The plaintiff claims Rs. 800, with interest from the date of suit to that of payment at such rate as the court deems reasonable.

the plaintiff should or should not get his costs. The plaintiff will not, in such a case, be debarred from showing that he had demanded the money by the fact that it was not alleged in the plaint. If, however, money is made payable under the bond at a specified time after demand, a previous demand would be necessary and it should be pleaded with specification of date, as the cause of action in such case arises from the expiry of the specified period after the demand.

Suits on security bonds also are brought in the same way as on ordinary simple bonds, **the conditions of the security, and their breach-being clearly specified so far as possible in the terms of the bond.** A regular suit lies even for the enforcement of a security bond given for the performance of any decree or part thereof, or for the restitution of any property taken in execution, or for the payment of any money or for the fulfilment of any condition imposed on any person under an order of the court in any suit or any proceeding consequent thereon. In such cases the decree or order can also be executed against the surety to the extent of his personal liability under the bond (Sec. 145, C. P. C.). That is, however, an alternative remedy. Where a security bond is offered under Or. 41, Rule 6, C. P. C. and property worth more than Rs. 100, - is mortgaged such a security bond is not exempt from registration. *Bishnath Sahu v. Prayagdin*, 1958 A. L. J. 353; *Sonatan Shaha v. Dina Nath Shaha*, 26 Cal. 222; *Nagarurn Sambayya v. Tangatur Subayya*, 31 Mad. 330 1925 Rang. 55; *River Steam Navigation Co. v. Jaim Mulla*, 1957 Ass. 157; See contra : *Kastoori v. Goverdhan* 1934 Lah. 138.

If the security bond is not personal but is a hypothecation bond a regular suit for its enforcement will be necessary (*Amir v. Mahadeo*

No. 27—Suit on a bond for the fidelity of a clerk*(Form No. 18, App. A., C. P. C.*

1. On the day of 19 , the plaintiff took *E. F.* into his employment as a clerk.

2. In consideration thereof on the day of 19 , the defendant agreed with the plaintiff that if *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

39 A. 225, 15 A. L. J. 76, 38 I. C. 33). But see *Beti Mahalakshmi v. Chaudhri Badan Singh*, 21 A. L. J. 604, in which it has been held that even a hypothecation security bond can be enforced against the executant in execution proceedings. It has, however, been held by the Madras High Court that Sec. 145, C. P. C. does not apply to proceedings for the enforcement of a surety bond taken by the decree-holder outside the court, and such bond has to be enforced by suit (*Subbaraya v. Sathanath*, 24 M. L. T. 516, 48 I. C. 940, 1918 (M. W. N.) 764). A security bond given by a guardian of a minor to the court appointing him can, on breach of the undertaking by the guardian, be enforced by any person, as trustee for the ward, to whom the court assigns it under Sec. 35, G. and W. Act. This assignment can be made even after the ward has attained majority, but must be made before the suit (*Smt. Mani Devi v. Smt. Anpurna*, 1943 (Pat.) 218, 206 I. C. 226).

A person named in a bond as obligee is entitled to sue, though he is a *benamidar* for another, without making the latter a party (*Parmeshwar v. Anardan*, 13 A. L. J. 24; *Singha v. Ayyaneri*, 43 I. C. 905 Mad). The real owner as well can sue, alleging that the obligee was a *benamidar*, but he must make the latter a party.

Limitation for a suit on a simple money bond is three years from the date fixed for payment, or if no such date is fixed, from the date of its execution (Articles 28 and 29 of the Act of 1963). The limitation for an instalment bond is prescribed by Articles 36 and 37 of the same Act.

The language of Arts. 36 and 37 of the Act of 1963 is identical with that of Arts. 74 and 75 of the Act of 1908. Dealing with the latter Articles, it has been held that Art. 74 (corresponding to Art. 36) will apply to cases where the suit is for the recovery of instalments as such and not for the recovery of the whole amount on the basis that it had fallen due because of some default. On the other hand where the whole amount falls due on one or more defaults being committed and the whole amount is claimed in the suit, the proper Article to be applied will be Art. 75. In cases where there is default

(Or, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him, in trust for the plaintiff, the bond should be void.)

(Or, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed).

3. Between the day of 19 , and the day of 19 , *E. F.* received money and other property amounting to the value of rupees, for the use of plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

No. 28—Suit on a security bond

1. On November 20, 1920, the plaintiff took one Khuda Baksh into his employment as a *Karinda* for collection of rent.

2. In consideration thereof, the defendant, by his bond of the same date, agreed with the plaintiff that if the said Khuda Baksh should not faithfully perform his duties as a *Karinda* to the plaintiff or should fail honestly to account to the plaintiff for all monies received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss the plaintiff might sustain by reason of the said Khuda

clause making the whole due on one or more defaults, it is open to the creditor to waive the benefit of the provision relating to defaults. If there is such waiver, limitation under Art. 37 will start from the date of a fresh default which is not waived. Whether a default has been waived or not is essentially a question of fact. (*Jawahar Lal v. Mathura Pd.*, 1934 All. 661 F. B.; *Sukhlal v. Bhura*, 1934 All. 1039; *Gokul Mohton v. Sheo Prasad Lal Seth*, 1939 Pat. 433 F. B.; *Arjun Sahai v. Pitambar Das*, 1963 All. 278). The distinction in the earlier Act between registered and unregistered bonds has been removed under the Act of 1963, and the limitation for both kinds of bonds is three years only.

Defence : In a suit on a bond for cash consideration, the defendant may plead that he did not receive full or any consideration. He may plead a payment, or discharge, or satisfaction. If breach of any condi-

Baksh's said default, not exceeding the sum of Rs. 1,000 with interest at 6 per cent per annum.

3. The said Khuda Baksh did not during his said employment faithfully discharge his duties as a *Karinda*, neither did he honestly account for no pay over to the plaintiff, all moneys coming to his hands on behalf of the plaintiff. Between November 20, 1920 and June 15, 1922 Khuda Baksh collected rents amounting to Rs. 900 for the use of the plaintiff, for which sum he has not accounted to the plaintiff, and the same still remains due and unpaid.

The plaintiff claims a decree for Rs. 900 principal and Rs. 162 interest, with further interest from the date of suit to that of payment at such rate as the court deems reasonable.

CANCELLATION OF AN INSTRUMENT (h)

No. 29—Suit for cancellation of a sale-deed executed by a minor

1. The plaintiff was born in 1908, and therefore is, and on June 3, 1925, was a minor.

2. On June 3, 1925, the plaintiff executed a deed of sale of his zamindari share in village Rasulpur in consideration of the defendant promising to pay him Rs. 1,000 in three months.

tion is alleged in the plaint, he may deny the breach or may plead any vaild excuse for it. If the bond is enforceable on the happening of any contingency, the defendant may plead that the contingency has not yet happened. He may plead that he was a surety for the other executant (*Mulchand v. Madho*, 10 A. 421; *Sheo Prasad v. Gobind Prasad*, 49 A. 464 at p. 468); but the Calcutta and Rangoon High Courts have held that evidence is inadmissible to prove that an executant who purports to be a principal was really a surety (*Maung Kogyi v. U. Kyaw*, 103 I. C. 79; *Harekchand v. Bishanchandra*, 8 C. W. N. 101). He may plead that the bond was delivered conditionally or for a special purpose or as a collateral security for another undertaking. Evidence of this defence would be admissible under proviso 3 to Sec. 92. Evidence Act (*Sheo Prasad v. Gobind Prasad*, 49 A. 464, 100 I. C. 332).

(b) As a general rule where the plaintiff is out of possession and is in a position to claim a decree for possession he should not be permitted to obtain merely a decree for the cancellation of an instrument for transfer. (*Laxmi Bai v. Lal Chand*, 1952 V. P. 69; see also 1950 Assam 72.)

If a person has reasonable threat of serious injury he can bring a

3. The defendant on June 5, 1925, applied to the Tahsildar for mutation of his name, and the plaintiff has reasonable apprehension that if the sale-deed is left outstanding the defendant will obtain possession of the said zamindari share of the plaintiff.

The plaintiff claims to have the said sale-deed adjudged void and cancelled.

No. 30—Suit for cancellation of a deed of gift obtained by under influence

1. The plaintiff's son Ram Kumar was, in June, 1924 employed by the defendant as *Karinda* to collect rents from his tenants.

2. On June 13, 1924, the said Ram Kumar realized as such *Karinda* Rs. 200 on account of rents due to the defendant from a tenant Krishna. The said Ram Kumar did not credit

suit for cancellation of certain recitals in the deed. (*Chaju Lal v. Gokul*, 1952 M. B. 169).

Some of these suits also fall under the heading "Suits for Torts" as they are based on fraud or undue influence. In a suit for cancellation of an instrument, the plaintiff must show—(1) that the instrument is void or voidable at his option, and (2) that he has a reasonable apprehension that the instrument, if left outstanding may cause him serious injury (Sec. 31, Sp. Rel. Act of 1963). A plaint in such a suit should, therefore contain—(i) a short reference to the instrument and its effect, (ii) a recital of facts making it void or voidable, and (iii) an allegation of the occasion for the suit, showing the serious injury the instrument is likely to cause to the plaintiff. There should be a definite prayer for cancellation. It is not sufficient to ask for a declaration that the deed is null and void in cases of voidable instruments. (*Varadachar v. Dasappa*, 14 Mys. L. J. 256). Such a suit can be brought also by the legal representative of the person who had executed the instrument (*Shravan v. Kashiram*, 100 I. C. 932, 51 B. 133, 29 Bom. L. R. 115), or even by a person not party to the instrument (*Abdul Jabbar v. Ganesh*, 1938 M. L. J. 54).

It is neither sufficient, nor necessary, to say that the instrument is void or voidable, for that is after all an inference of law, but facts which make it void or voidable should be alleged, e.g., that the plaintiff was a minor or a person of unsound mind when he executed it or that it was executed under coercion or undue influence.

Any instrument which is not legally enforceable is void, whether it is so for any reason given in the Contract Act or for any other reason, e.g., because it is a forgery (*Venkata v. Kadambi*, 7 M. L. J. 270).

the said item of Rs. 200 in the account books, nor did he account for it to the defendant, but converted the money to his own use.

3. The defendant threatened the plaintiff that, unless the plaintiff paid him Rs. 200 and did further make a gift of his house in Banker's Street, Meerut, to him, the defendant would prosecute the said Ram Kumar.

4. The plaintiff was, at the time, in great mental distress, and had no independent advice, and was, by reason of the said threat of the defendant, induced to execute a deed of gift in respect of the said house in favour of the defendant on July 20, 1924.

When an instrument is not wholly void or voidable, it may be cancelled partially (Se. 32, S. R. Act of 1963).

But plaintiff cannot get any relief by pleading his own fraud which has been carried out (*K. M. Esof v. Hamida Bibi*, 163 I. C. 671, 1936 (Rang.) 218; *Nawabsingh v. Saljitsingh*, 162 I. C. 958, 1936 (All.) 401; *Hafizulla v. Ally Mulla*, 164 I. C. 914, 1936 (Rang.) 405; *Nambiappa v. Muthuswamy*, 163 I. C. 711, 1936 (Mad.) (630).

The injury apprehended should be real and not imaginary and the apprehension must be reasonable; for instance, when a sale-deed is registered at the request of the vendee in spite of the denial of execution by the vendor (*Mohima v. Jugal Kishore*, 7 C. 736), or where the defendant makes an application for entry of his name in the village register under the void deed. But, where a suit on the forged bond is already pending and the plaintiff has set up a plea that the bond is void, a suit for cancellation is not necessary (*Chogan v. Dbondu*, 27 B. 607).

A sale-deed of a holding not legally transferable is void, but it can do no injury to the vendor, so long as he remains in possession, and need not therefore be cancelled. When the plaintiff is in peaceful possession of the property, in spite of an instrument which the defendant is setting up against a third person in a proceeding which will not be binding on the plaintiff the plaintiff cannot be said to have any reasonable apprehension of injury (*Narendra v. Basudeo*, 14 I. C. 81 Oudh.).

If possession has also been delivered under an instrument, the court will, in its discretion, refuse to cancel it, until a prayer for possession is also made.

Minor : A minor's contract is void, hence he can have it cancelled. If the minor was old enough to commit a fraud by inducing others to think that he was of age, he cannot take advantage of it, and if the court cannot restore the parties to their original footing the minor would be bound by his contract as if he were an adult (*Leslie Ltd. v. Sheill*, (1914) 3 K. B. 607, 83 L. J. K. B. 1145, 111 L. T. 106, 58 S. J. 453, 30 T. L. R. 460; *Mahommed Syedol v. Yeob*, 39 I. C. 401, 21 C. W. N. 257, 1917 M. W.

5. The defendant has sent a notice to the plaintiff calling upon him to deliver possession of the house to the defendant and the plaintiff apprehends that if the deed of gift is left outstanding the plaintiff will be deprived of the possession of the said house.

The plaintiff claims to have the said deed of gift adjudged void and cancelled.

**No. 31—Cancellation of a sale-deed obtained
without plaintiff's consent and by
defendant's fraud**

1. The plaintiff is a *pardanashin* and illiterate widow, and the defendant is her brother's son who has been managing her property ever since the death of her husband three years ago, and the plaintiff always reposed implicit confidence in him and had no other independent advice.

2. On December 20, 1924, the defendant verbally represented to the plaintiff that it would facilitate the transaction of the plaintiff's business by the defendant if the plaintiff executed a general power-of-attorney in defendant's favour. The plaintiff assented to the proposal, and asked the defendant to have a proper deed drawn up.

N. 162, 19 Bom. L. R. 157 (P. C.)). But this rule is not applicable where the minor has not received any advantage and the effect of avoiding the transfer will only be to restore the parties to their original position (*Ganganand v. Sir Rameshwar Singh*, 102 L. C. 449 Pat.). A Full Bench of the Allahabad High Court has held that a contract by a minor being void the fact that he made a false representation as to his age at the time of the contract cannot make a difference. There is no estoppel and no rule of equity entitling the court to enforce the contract (*Ajodhia Prasad v. Chandar Lal*, 1937 All. 610).

Simply allowing another person to deal with him as if he were an adult or doing acts which only an adult can properly do is not, however, sufficient to constitute a fraudulent misrepresentation on the part of the minor (*Ganganand v. Sir Rameshwar Singh*, 102 L. C. 449 Pat.). Where a person under the guardianship of Court of Wards simply stated that he was 20 years of age without disclosing the fact that he was a ward of the Court of Wards it was held that the suppression amounted to misrepresentation (*Budha v. Lakshmi*, 1929 (Lah.) 880).

It has been held that even when the minor had represented that he was of age and the other party acted on such representation, still the minor is not estopped from proving his minority (*Koduri v. Shumulair*, 94 I. C.

3. On December 22, 1924, the defendant brought to the plaintiff a document and represented that it was a general power-of-attorney and induced the plaintiff by such representation to affix her thumb mark to it.

4. Later on the same day, December 22, 1924, the defendant brought the Sub-Registrar of Ghazipur to the plaintiff's house. The said Sub-Registrar did not read out or explain the contents of the deed to the plaintiff, but simply asked her whether she had put her thumb mark on it. The plaintiff admitted having done so, and the Sub-Registrar thereupon got her thumb mark affixed at another place on the said deed.

5. The representation of the defendant that the deed was a general power-of-attorney was false. The plaintiff has now, on April 12, 1925, learnt that the deed was a deed of sale in favour of the defendant in respect of the plaintiff's share in the zamindari of village Na'agarh.

6. The defendant well knew that the said representation was false, and he made the same fraudulently with a view to induce the plaintiff to affix her thumb mark on the deed and to admit the execution of the deed before the Sub-Registrar.

7. The plaintiff has learnt that the defendant has made an application to the Tahsildar for mutation of his name on

853, 1926 (Mad.) 603; *Radha Kishan v. Bhorey*, 26 A. L. J. 837, 110 I. C. 373, 1928 (All.) 626; (*Ajodhia Prasad v. Chandar Lal*, 1937 All. 610; *Gulabchand v. Chunnilal*, 1929 (Nag.) 156; *Gadigeppa v. Balangowda*, 55 B. 741, 33 Bom. L. R. 1313, 1931 (Bom.) 561). But in such cases the benefit received by the minor under the sale-deed should be refunded before the sale is set aside, though ordinarily a minor is not required to refund the benefit received under a void contract (*Hanmatha Rao v. Sitaramayya* 1938 M. W. N. 1076, 48 L. W. 604; *Abdul Subhan v. Nusrat Ali* 165 I. C. 523, 1937 (Oudh) 170; *Manmath v. Exchange Laon Co.*, 165 I. C. 363, 1936 (Cal.) 567). But if he made no representation or was not guilty of any fraud, he is not liable at all for mere failure to reveal his age when no inquiry was made from him (*Sherkhan v. Akbtarkhan*, 168 I. C. 730, 1937 (Lah.) 598; and if the vendee knew of the vendor's minority, he is not entitled to refund of the price paid (*Mt. Bachai v. Hayat Mohammad* 1940 (Oudh) 119, 185 I. C. 337), nor is he liable by reason of merely making a false representation unless the transaction had been the con-

the plaintiff's said share in the zamindari property in village Nalagarh and she apprehends that she will be deprived of the said property.

The plaintiff, therefore, claims to have the said deed of sale adjudged void and cancelled.

No. 32—Cancellation of will executed while executant was not in his proper senses

1. One Ram Prasad, who owned considerable zamindari property, died on April 16, 1925.

2. The plaintiff is the daughter of the said Ram Prasad, and no nearer relation of the latter was in existence at the time of his death. The defendant is his sister's son.

sequence of such representation (*Ko Maung U. v. Ma Hall On*, 1939 (Rang. 399)).

Cour-fee : A suit for cancellation of an instrument is one for a declaration with a consequential relief, and court-fee is payable on the amount at which the relief sought is valued. In U. P. this amount should be the money or the market value of the property secured by the instrument or such part of it as is sought to be cancelled, if the plaintiff was a party to the instrument, or one-fifth of such money or market value if he or his predecessor was not a party (S. 7 (iv-B) added by the U. P. Amendment Act 1939). Document executed by guardian not only for himself but also on behalf of minor, the minor is also a party to the document and court fee is payable under section 7 (IV-A). (*Surajparsad v. Gagannath Parsad*, 1954 A.L.J. 710). In Madras, the amount should be such money or market value in either case. If the plaintiff was no party to an instrument, e.g., if the suit is by a Hindu son for setting aside a deed of gift made by his father, there need not be a prayer for cancellation, but a declaration that the deed is null and void will be sufficient. A prayer for cancellation is properly necessary when the plaintiff was himself a party to the instrument, or if he was a minor and his duly appointed guardian made a transfer on his behalf with the permission of the court but even if the plaintiff was a party to this deed he can allege that the deed was sham and nominal and confers no title on the defendant and claim a declaration of his own title and injunction against defendant's interference with his possession, and he need not in such a case pray for cancellation of the deed (*Sabid Hameed v. K. C. P. Mohideen*, 1948 (Mad.) 451, 1948—M. L. J. 270, 1948 M. W. N. 259). But in either case for the purpose of the court-fees the suit should be regarded as one for declaration with a consequential relief (*Babu Rao v. Balaji Rao*, 118 I. C. 465, 1929 (Nag.) 71; *Arumnachalam v. Rangasamy*, 38 M. 922). Even if the suit is framed as one for declaration, if cancellation is necessarily implied, court-fee must be paid *ad Balorem*, e. g., in a suit for declaration that a compromise decree is not binding on the plaintiff, cancellation of the decree is implied (*A. C. T. N. Chidambaram v.*

3. The defendant has applied for mutation of his name on the property of the said Ram Prasad on the basis of a will alleged to have been executed in his favour by the said Ram Prasad on April 15, 1925.

4. The said will set up by the defendant was never executed by the said Ram Prasad.

5. In the alternative, the said will was not executed by the said Ram Prasad while he was in his proper senses; the said Ram Prasad had been suffering from dysentery and fever for about a month before his death and had, during the week before his death become extremely weak in body and mind and was unable to move from his bed and was incapable of understanding his affairs and of forming any rational judgment concerning them. During the last three days of his life, i. e., April 14, 15, 16, 1925, he was totally unconscious and could not hear or talk to any one.

A. C. T. N. Nagappa, 1944 (Mad. 478). A suit for declaration that property purchased by plaintiff was not subject to *wakf* without an express prayer, for cancellation of *wakfnama* was held to be in essence one for cancellation (*Kamala Devi v. Sunni Central Board*, 1949 (All. 63)—If in a suit for cancellation of a deed of gift relief of possession is also added no court-fee on the latter relief is required as that is only ancillary to the main claim (*Thangochi v. Moideen*, 56 M. 401, 1933 Mad. 231, *Hajrabi v. Md. Ibrahim*, 1948 Nag. 219). Where the plaintiff as a minor is a party to a deed executed by the guardian he must sue for cancellation and also possession. (*Shanker Narayan Pillai v. Kandesami Pillai*, 1956 Mad. 670 F. B.).

Limitation is three years under Art. 59 of Act of 1963, but if a document is null and void or evidences a transaction which is so from its very inception it is not necessary to have it cancelled and a suit for a declaration that it is null and void may be brought within three years under Article 113 and a suit for possession of property conveyed by it can be brought within 12 years. For cases on this point under the Limitation Act, 1908, see. *Muhammad Nazir v. Zulaikha*, 6 A. L. J. 289, 50 A. 510, 1928 (All.) 267, 109 I. C. 54; *Krishna Swami v. Kuppu*, 1929 (Mad.) 478 *Mst. v. Kundan*, 1945 (All.) 367).

Defence : In such cases defence is generally the denial of facts making the contracts void or voidable. The defendant may claim refund of the benefit received by the plaintiff under the instrument as a condition precedent of its cancellation (Sec. 33 Sp. Rel. Act of 1963) (*Abdul Majid v. Ramiza*, 1931 M. W. N. 150, 1931 (Mad.) 468, 131 I. C. 153, case under section 41 of the specific Rel. Art, 1877). It may be pleaded that the suit is unnecessary as the instrument is void in law and cannot do any harm to the plaintiff, as a sale-deed of an occupancy holding; or

The plaintiff claims—

(1) A declaration that the said will was never executed by the said Ram Prasad.

(2) In the alternative to have the said will adjudged void and cancelled.

CHARGE (i)

No. 33—Suit for enforcement of a charge

1. The defendant and one Ram Lal are the son of the plaintiff.

2. By a private deed of partition, dated September 20, 1922, to which the plaintiff, defendant and the said Ram Lal were parties, the whole property left by the plaintiff's husband was divided equally between the defendant and Ram Lal, and the defendant and the said Ram Lal agreed that each of them should pay a monthly allowance of Rs. 100

that the decree would be useless as when the defendant is in possession of the property conveyed under the instrument. He may plead that both the parties were equally guilty of fraud (*Bindeshri v. Lekhrai*, 33 I. C. 711, 1 Pat. L. J. 48).

(i) "Charge" differs from a mortgage in the essential circumstance that in the latter there is a transfer of an interest in specific movable property which is absent in a charge. Another distinction is that while a charge can be enforced only against a person with notice, a mortgage being a transfer of an interest in property can be enforced against subsequent transferees even if they have no notice of it. Ordinarily, charge negatives a personal liability and the remedy of the charge-holder is against the property charged only, but when there is also in addition a personal covenant, the security is collateral to the personal covenant and the transaction would become a simple mortgage (*Benares Bank v. Har Prasad*, 163 I. C. 69, 1936 (Lah.) 482). A charge may be created by agreement as a mortgage, as well as by operation of law (e.g., the charge for unpaid purchase money on the property sold or a charge created by a decree). A charge-holder's remedy is the same as that of a simple mortgagee (Sec. 110, T. P. Act); i.e., he can sue for realization of his money by sale of the property charged with it.

Full particulars of the charge, i.e., when and how it was created, the property charged, the amount for which it was charged, the persons by whom, and those in whose favour, the charge was created must be mentioned in the plaint. There is no form in the Code of Civil Procedure for a suit to enforce a charge.

Any one in whose favour or for whose benefit a charge is created may sue although he was no party to the agreement (*Khwaja Muhammad Khan v. Hussain*, 32 A. 410, 7 A. L. J. 71, 14 C. W. N. 865, 12 C. L. J.

to the plaintiff for her life. It was further agreed that the amount of the said monthly allowance should be a charge on the shares allotted to the defendant and the said Ram Lal respectively.

3. The defendant has, since the aforesaid partition been in possession of the share of property allotted to him and mentioned fully at the foot of the plaint.

4. The defendant has not paid aforesaid monthly allowance of Rs. 100, or any part thereof, ever since the aforesaid partition.

The plaintiff claims payment of Rs. 2,400 principal and Rs. , on account of interest from the date of the partition deed, under the Interest Act at the usual rate of 12 per cent per annum, total Rs. , or in default sale of the property mentioned at the foot of the plaint.

(For precedent of a suit for unpaid purchase money see under Sale of Land).

CONTRIBUTION (j)

No. 34—Suit for contribution between co-judgement-debtors

1. The plaintiff and the two defendants are and in 1357 Fasli were, owners in equal shares of an occupancy holding in village Rasulpur, Tahsil Math, district Mathura.

205, 20 M. L. J. 614, 12 Bom. L. R. 638 (p. c.) But a charge for unpaid purchase money cannot be so enforced as Sec. 55 (4), Transfer of property Act makes the property chargeable "in the hands of the buyer" (*Gur Dayal v. Karam Singh*, 38 A. 254) or any transferee without consideration or any transferee with notice of non-payment.

A charge cannot be enforced against property in the hands of a *bona fide* transferee for consideration and without notice of the charge (Sec. 100), but a property subject to a recurring charge and sold for arrears payable in respect of the sum charged can be sold for future payments (*Jannendra Nath v. Sasbi Mukhi*, 1940 (Cal.) 60). When a suit for the money has once been brought, there is nothing to prevent a subsequent suit to enforce the charge (*Bank of Bihar Ltd. v. Omitave Chatterji*, 186 I. C. 221 Pat.).

Limitation is 12 years under Art. 62 of the Act of 1963.

(j) The basis of a suit for contribution is the joint liability of the parties for payment of a sum of money to a third person and payment

2. Ram Adhin the zamindar of the said holding obtained a decree (No, 104 of 1951) from the Court of the Sub-Divisional Officer, Math for arrears of rent of the said holding for the year 1357 against the parties jointly.

3. The plaintiff and both the defendant were in default for the whole rent of the year 1357.

4. The said Ram Adhin put the said decree in execution and realized the whole decretal amount, viz. Rs. 597 from the plaintiff alone

The plaintiff, therefore, claims Rs. 199 from each defendant with interest from the date of suit to that of payment.

by the plaintiff in excess of his liability. Until a plaintiff has paid more than his share of the liability, there is no right of contribution. (*Dhirendra Nath v. Harendar Nath*, 64 C. L. J. 55). Where the plaintiff had merely executed a bond in favour of the creditor and had not actually paid the money due to the creditor from him and the defendant, it was held he could not sue for contribution (*Raghubar Dayal v. Abdul Ghaffar*, 161 I. C. 152, 1936 (Oudh) 253). If there are several defendants the plaintiff cannot get a joint decree against them as that would result in a multiplicity of such suits (*Moti Chand v. Bajran Sahai*, 17 I. C. 45, 16 C. L. J. 148). In a suit for contribution, therefore, the plaintiff should allege (1) facts showing the joint liability of the parties, (2) the plaintiff's share of liability for the joint debt, (3) that he has paid more than his liability and the amount of the excess, and (4) the respective liabilities of each of the defendants to contribute to the excess which the plaintiff has paid. If the plaintiff settled the creditor's claim at a lesser amount than what was due, all the debtors must be given advantage of the reduction and contribution should, in all cases, be made on the basis of what the plaintiff had actually to pay. If any of the defendants has also paid a portion of the debt, he should be given credit for the same, and account of contribution should be made on the basis of the total sum paid by him and the plaintiff. Unless the account by which the liability of each defendant is worked out is a *very simple* one, it should be given in details as particulars of the liabilities of the defendants. The creditor or other person to whom payment has been made by the plaintiff is not a necessary party to suit for contribution.

Where, however, there is no joint liability there is no basis for a suit for contribution. For instance, if one of the heirs of an owner of property incurs expenses in litigation against third parties he cannot sue the other heirs for contribution to the expenses, even if the latter have been incidentally benefited by the result of that litigation (*Rahaman v. Dillu*, 103 I. C. 299 Lah.). But if it is shown that the plaintiff did not incur the expenditure gratuitously he can be allowed contribution. This was the case of a co-owner repairing a joint well (*Bibi Baratan v. Mt Chandramani*, 167 I. C. 42, 1937 Pat. 103)

No. 35—Suit for contribution between co-sureties

1. By a bond executed on December 10, 1921, the plaintiff and the two defendants jointly and severally became sureties for one Balak Ram who had, at the time, been appointed Nazir in the Munsif's Court at Muzaffarnagar, in the penalty of Rs. 1,000, for the due performance of the said Balak Ram's duties as such Nazir.

2. The said Balak Ram misappropriated Rs. 600 of the Government money and a decree (No. 20 of 1924) for the said amount and costs was obtained by the State Government from this court against the plaintiff.

3. The plaintiff paid Rs. 696 on May 24, 1925 on account of the said decree and costs.

The plaintiff claims Rs. 232 from each of the two defendants, with interest from the date of suit to that of payment.

Questions of contribution generally arises between co-debtors, co-mortgagors, co-owners, co-sureties, co-trustees joint-tort feorsors of persons having a joint liability. Except under special circumstances (e.g. the case of a definite undertaking by one partner to indemnify another) there is no contribution between partners (*Debesb Chandra v. Benoy Krishna* 43 C. W. N. 1214). As between co-judgement debtors the judgment is conclusive as to the right of the plaintiff to the amount decreed, but not as to the liability of each of the defendants, unless the same has been adjudicated upon. So it is open to one defendant to a joint decree to show that he is not liable for contribution as he was a surety for the other. Even if a creditor exempts one debtor from the suit and obtains a decree against the other the latter brings a suit for contribution against the former, in spite of the fact that a claim on the original debt would be barred against him at the time he is called upon to contribute. So, if a suit is dismissed against one defendant on the ground of limitation and is decreed against the other, whose liability was kept alive, the latter can sue the former for contribution, if he had to pay more than his share of liability (*Abraham v. Raphial* '39 M. 288, 17 M. L. J. 746, 27 I. C. 337, 16 M. L. J. 569). This rule will equally apply to a mortgage decree (*Bibari v. Indra* 104 I.C. 206, 45 C. L. J. 571, 31 C. W. N. 985, 1927 (Cal.) 665). A decree for contribution, except one between co-mortgagors, is always personal and no charge can be claimed on the property in respect of which the plaintiff has made the payment (*Bindeshri v. Girdhar*, 34 I. C. 91 All.).

Costs : It can not generally be said that there is no contribution in respect of costs. There is no contribution if the parties had joined in bringing a deliberately false claim (*Kalanath v. Jadu Nandan*, 58 I. C.

No. 36—Suit for contribution between joint-tort-feasors

1. The plaintiff and the defendant purchased, on July 4, 1920, a house in equal shares from one Ram Narayan, in good faith believing the said Ram Narayan to be the adopted son of the former owner, Sant Lal, and remained jointly in possession of the said house from the date of purchase.

2. One Sri Narayan brought a suit (being suit No. 14 of 1924) against the parties in the court of the Subordinate Judge at Gaya, on the allegations that the said Ram Narayan was not the adopted son of the said Sant Lal, and that the said Sri Narayan was, as nephew and heir of Sant Lal, real owner of the said house.

28), but it is different if the suit was *bona fide* (*Ramdeo v. Rai Baijnath*, 58 I. C. 31; *Ramsarup v. Baijnath*, 43 A. 77, 18 A. L. J. 872, 58 I. C. 324). The general rule is that there will be contribution for costs, unless the defendant can show some equity which entitles him to exemption (*Baburam v. Badridas*, 24 A. L. J. 720; *Kulada Prasad v. Gribala*, 40 C. W. N. 1089). For instance, he can plead that he had admitted the claim and costs were incurred simply on account of the plaintiff's contest (*Bhawani Prasad v. Ram Prasad*, 167 I. C. 913, 1937 (A.L.J.) 227; *Bishambhardeo v. Hitnarayana*, 160 I. C. 796, 1936 (Pat.) 49).

If costs are awarded against several independent trespassers claiming under separate titles, there is no right of contribution between them (*Nand Lal v. Beni Madho*, 40 A. 675, 16 A. L. J. 689, 47 I. C. 980; *Parsotam v. Lachmi Narayan*, 40 A. 99, 20 A. L. J. 890, 69 I. C. 688).

Joint-tort-feasors : Unlike the case in England, there is contribution in India. The rule in *Merryweather v. Nixon*, (1799) 101 E. R. 1337 does not apply in India and a suit for contribution by one tort-feasor, who has made a payment occasioned by the tort against another tort-feasor is maintainable. Even in England the rule in *Merryweather v. Nixon* has been abrogated by the Law Reforms (Married Women and Tort-feasor) Act, 1935. See (*Kushal Rao v. Bapu Rao*, 1942 (Nag.) 52; *Dharwadhar v. Chandrasekhar*, 1951. All. 774 F. B; *Edra Venkatrao v. Edra Venkayya*, 1943 Mad. 38). The liability of joint tort-feasors is joint and several. The plaintiff can recover the whole of the damage from one of the joint tort-feasors. One of them has no right to insist on apportionment. (*Absanali v. Kazi Syed Hifazatali*, 1956 Nag. 146).

Co-mortgagors : As several properties mortgaged to secure one debt are, as between the owners, liable to contribute rateably to the debt secured if the whole debt is realized from some property, the owner of each property has a right to call upon the owners of the other properties, to contribute rateably to the amount which he had to pay in excess of

3. The plaintiff and the defendant agreed to defend the suit jointly but the plaintiff incurred all the costs amounting to Rs. 200.

4. The said Sri Narayan obtained a decree for ejectment, mesne profits and costs against the parties, and realized Rs. 4,000 on account of mesne profits and costs from the plaintiff.

The plaintiff claims from the defendant a moiety of the amount paid by him to Sri Naraya and of that spent by him as costs, i.e., Rs. 3,100 in all, with interest from date of suit to that of payment.

that due from his property (Secs. 82 and 95, Transfer of Property Act). This liability of the owners of the other properties is not personal but is limited to the property mortgaged, in other words, there is a charge of the rateable mortgage money on each property and the suit for contribution must, therefore, be for the enforcement of that charge (*Ibn Hasan v. Brij Bhukan*, 1 A. L. J. 148 (6.2); *Hira v. Palku*, 3 Pat. L. J. 490). The prayer should be for sale of the property, subject to the charge, and not for a simple money decree. The rateable mortgage money charged on each property should be determined by the ratio of the values of the several properties at the date of the mortgage. The value should be the market value, minus the amount of any prior encumbrances to which the property was subject. The money which the plaintiff had to pay or which was realized from his property and which has to be distributed over all the properties is the legitimate, mortgage money or cost of a mortgage decree or execution, but not any other money, e.g., if the plaintiff got the auction sale of his property set aside under O. 21, R.89, C. P. C. by paying an additional 5 per cent for the purchaser, he cannot claim contribution in respect of it (*Bhagwan Singh v. Md. Mazahar*, 12 A. L. J. 394).

If, however, one of the two mortgaged properties has been sold by the mortgagor, no suit for contribution will lie against the purchaser, if the whole mortgage money is realized from the property left with the mortgagor (Sec. 56, Transfer of Property Act). But if the latter property had also been sold to another person, such person could claim contribution from the first purchaser (*Din Dayal v. Lursaran*, 42 A. 336; *Magniram v. Mebadi*, 31 C. 102). The release by mortgagee of any part of the mortgaged property does not absolve that part of the liability from contribution under Sec. 82 (*Shab Ram Chand v. Prabhu Dayal*, 1942 (P. C.) 50).

If a part of the mortgaged property is sold subject to the mortgage, the owner of the other part has a right of contribution from the purchaser (*Rama Shankar v. Ghulam Husain*, 19 A. L. J. 584). But there is no right of contribution, as against a part of the property sold in execution of a decree on the mortgage (*Karamat Ali v. Gorakhpur Bank*, 44 A.

No. 37—Suit for contribution between co-mortgagors

1. One Ram Lal was the owner of two entire villages Rahimabad and Rasulpur.

2. The said Ram Lal hypothecated village Rahimabad by a bond dated January 21, 1916 to one Roshanlal.

3. By a subsequent bond dated November 18, 1919, the said Ram Lal hypothecated both the villages, Rahimabad and Rasulpur, to one Pran Sukh.

4. On June 20, 1920, the said Ram Lal executed, for consideration, a sale-deed in favour of the plaintiff in respect of his equity of redemption in village Rasulpur.

5. On March 20, 1921, the defendant purchased the equity of redemption in village Rahimabad in execution of a simple money decree against the said Ram Lal.

488). The remaining property is liable for the whole balance of the mortgage debt (*Bhora Thakurdas v. Collector of Aligarh*, 32 A. 612 p. c.). It has been held by the judges of the Allahabad High Court (Banerji, J. dissenting) in *Ibn Husain v. Brij Bhukan*, 29 A. 407 that no charge arises unless the whole mortgage money is satisfied by plaintiff's property and if only a portion is satisfied no charge for the excess arises in favour of the plaintiff.

In such a suit for contribution, all persons interested in the mortgaged property must be impeaded, all their liabilities should be determined once for all (*A. James v. Achaibar Singh*, 185 I. C. 297). The amount to be charged on each property should be carefully worked out by the plaintiff according to the above principles, and, if the working is complicated, it should be given separately in the plaint as "Particulars" of the amount claimed.

Parties : As the respective liabilities of all parties is to be determined in such a suit once for all, all interested persons should be impleaded. (*A James v. Achaibar*, 1940.(Pat.) 119, 185 I. C. 297).

Limitation : A suit for contribution must be brought within three years of the payment (Art. 23 or 48 of the Lim. Act. 1963) or within 12 years if the charge is enforced (Art. 62 of Act of 1963).

Defence : The defendant may deny his liability in *toto* or in part., for which the decree was passed against the parties was payable by the plaintiff himself. The Calcutta High Court has held that a defendant against whom a decree for rent had been passed jointly with the plaintiff could not show that he had no interest in the tenure (*Debendra v. Pro-*

6. Pran Sukh, mortgagee of both the villages Rahimabad and Rasulpur, obtained a decree No. 410 of 1924 for sale of both the said villages, on foot of his bond, dated November 18, 1919, and in execution thereof purchased village Rasulpur for Rs. 9,000 which was the amount of his decree.

7. The plaintiff claims Rs. 3,000 to be the rateable charge of the said mortgage debt of Pran Sukh on the village Rahimabad.

Particulars :—The market values of Rahimabad and Rasulpur on the date of Pran Sukh's mortgage were Rs. 8,000 and Rs. 10,000 respectively. As the amount of the prior charge of the said Roshanlal on Rahimabad was, on the date of Pran Sukh's mortgage, Rs. 3,000, its contributing value of Rs. 5,000. Rahimabad and Rasulpur were, therefore, liable to contribute towards Pran Sukh's mortgage debt of Rs. 9,000 in the ratio of Rs. 5,000 to Rs. 10,000, i.e., the proportionate charge on Rahimabad was Rs. 3,000.

The plaintiff claims Rs. 3,000, with interest from date of suit to date of payment, or, in default, sale of the entire village Rahimabad.

sanna, 95 I. C. 41, 1926 (Cal.) 951). He may plead that the plaintiff has not paid the whole decretal amount, but has obtained a reduction from the decree-holder by private settlement, or that both parties had paid the debt through the defendant. The mode of determining the respective liabilities of the parties adopted by the plaintiff may be attracted. Where the parties are partners, defendant may plead that the suits not maintainable without a claim for dissolution of the partnership (*Damodara v. Subaraiya*, 43 I. C. 217 Mad.).

The Court should be slow to throw out a claim on a technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side however, clumsily or inartistically, the plaint may be worded. Where on the facts set out by a plaintiff it is clear that he is entitled to contribution, the method of contribution being a matter of law, it is for the Judges to apply the law to the facts stated and give the plff. such relief as is appropriate though the specific provisions of Transfer or Property Act have not been relied upon in the plaint. (*Kedar Lal Seal v. Hori Lal Seal*, 1952 S. C. 47).

DECREE (k)

No. 38—Suit for damages for not certifying payment of a decree

1. On January 20, 1925, the plaintiff paid to the defendant, and the defendant accepted the sum of Rs. 1,200 in full satisfaction of the defendant's claim under decree No. 520 of 1920, passed by this court and there was thus an implied agreement that the defendant would certify the payment to court and would not take out execution of the decree.

2. In spite of the aforesaid satisfaction, and in breach of the said implied agreement, the defendant put the said decree in execution and got a warrant of attachment of the plaintiff's movable property issued by this Court. The plaintiff has thus to pay, and he did pay, on May 26, 1922, the sum of Rs. 1,276, being the decretal amount and costs entered in the warrant of attachment.

The plaintiff claims Rs. 1,276 as damages, with interest from the date of suit to that of payment.

(k) No uncertified payment can be recognized by the execution court, and the decree must be executed in spite of any payment having been made by the judgment-debtor. The only remedy of a judgment-debtor against such a dishonest decree-holder is by a regular suit. Even if the act of the decree-holder is fraudulent, still the judgment-debtor can have no redress in the executing proceedings (*Birao v. Jainurat*, 13 I. C. 63, C. L. J. 174, 16 C. W. N. 923).

But the suit which a judgment-debtor can bring is not one to enforce an uncertified payment (*Abdul Rahman v. Khoja*, 11 B. 6), or for an injunction to restrain execution (*Laldas v. Kishor Das*, 22 B. 463). It is a suit for damages for breach of an implied contract to certify payment and not to take out execution for the amount received out of Court (*Krishna v. Savuri Muthu*, 36 M. L. J. 396, 42 M. 338, 50 I. C. 584; *Gopalaswami v. Nammalwar*, 36 M. L. J. 175, 48 I. C. 810; *Hanmat v. Sobbohbat*, 23 B. 394; *Ramdas v. Sukhdeo*, 178 I. C. 196, 1939 (Pat). In this view, the mere fact of applying for execution would, though amounting to a breach of the contract, give no cause of action unless any damages have accrued to the plaintiff. If he is made to pay any money or is put to any loss the execution, he can recover it. The Allahabad High Court has disagreed with this view and held that there is no implied contract in such cases but the law only casts a duty on the decree-holder to certify payment, therefore, there can be no suit for damages for breach of contract and that in any case the defendant could himself certify and minimize his damages and further that even if there was a contract it

No. 39—Suit for refund of an uncertified payment

1. On January 20, 1922, the plaintiff paid Rs. 800 to the defendant in part payment of the latter's decree No. 520 of 1920 passed by this Court, and the defendant agreed to credit the money towards the said decree.

2. On June 20, 1922, the defendant applied for execution of the said decree in full, and did not give credit for the sum of Rs. 800 paid to him as aforesaid.

3. The plaintiff had raised the said sum of Rs. 800 by a loan from Ram Narain of Khatauli at an interest of 12 per cent per annum.

The plaintiff, therefore, claims refund of Rs. 800 with Rs. 48 on account of interest from the date of payment to the date of suit at 12 per cent per annum, by way of damages and further interest from the date of suit to that of payment.

was without consideration (*Karim Bux v. Debi*, 1933 A.L. J. 670, 1933 (All.) 511). The Allahabad and Calcutta High Courts have held that the money paid to the decree-holder and not applied by him to the purpose for which it was paid can be recovered on the ground of failure of consideration (*Genda v. Nihal*, 30 A. 464, 5 L. J. 475; *Mahbub Ali v. M. Syed Md. Husain*, 104 I. C. 419 All; *Shyama Charan v. Chairanya*, 11 I. C. 1 Cal.). In this view, a suit for refund of the money will lie as soon as the decree-holder puts in an application for execution without crediting the payment, though in two of the reported cases the suit were not brought until the judgment-debtors had been made to pay the money twice over. Whatever may be the legal merits of the two views, that of Allahabad and Calcutta is certainly more equitable. It would be safer for the judgment-debtor or institute his suit after depositing the decretal amount in the execution court, and then he can bring a suit for damages instead of one for refund, or the suit can be brought in the alternative for damages or for refund.

Limitation : Three years under Art. 55 of Lim. Act, 1963 for suits for damages for breach of contract. If the suit is framed as one for failure of consideration, three years from failure under Art. 47 of the Act of 1963.

Defence : Defendant may plead that no damages have occurred to the plaintiff, or that the payment was not made specifically towards the decree, hence the defendant has appropriated it towards another debt, or that the payment was specifically made towards another debt.

No. 40—Suit for an injunction to restrain execution*

1. The defendant instituted a suit in this court against the plaintiff, being suit No. 148 of 1926, for recovery of Rs. 2,000.

2. On June 22, 1926, during the pendency of the said suit, the parties verbally agreed with each other that if the plaintiff did not contest the said suit and allowed a decree to be passed *ex parte* the defendant would accept Rs. 1,800 only in satisfaction of his whole claim if paid within a year of the decree and would not execute his decree.

3. The plaintiff did not contest the said suit and an *ex parte* decree was passed against him for Rs. 2,000 and costs.

4. The defendant has, on August 20, in breach of his aforesaid agreement, put in an application for execution of the said decree and threatens to realize the whole amount of the said decree by execution proceedings.

5. The plaintiff claims an injunction restraining the defendant from executing the said decree except in case the plaintiff fails to pay the defendant Rs. 1,800 within one year of the said decree.

(For suits to set aside decree see under "*Fraud*" "*Minor*").

DEPOSIT (1)**No. 41—Suit for recovery of deposit**

1. The defendant is a banker carrying on banking business at Saharanpur.

*An agreement anterior to the decree cannot be pleaded as a bar to the execution of a decree but a suit lies for injunction to restrain the decree-holder from executing the decree in contravention of the agreement (*Panchananda v. Brojendra*, 126 I. C. 265, 1930 (Cal.) 356, 34 C. W. N. 150, *Bhaskar v. Nilkanth*, 1938 Nag. 265; *Coop. Bank v. Ram Sarup*, 1953 Punj. 267; *Mulla Ramzan v. Maung Po.*, 1926 Rang. 140; *Krishnaraj Tdg. Corpn. v. Ram Saran Das*, 1962 A. L. J. 442.) The Madras and Andhra Pradesh High Courts are of a different opinion and hold that such a pre-decree agreement can be enforced in execution *Butchiab Chetty v. Tayar Rao* 1931 Mad. 399; *Sait Hemraja v. Katta Subramanyam*, 1960 A. P. 324).

(1) **The conditions on which the deposit was made must be stated.** As cause of action in such cases arises from the date of demand, demand and refusal must also be alleged, and it is in this latter feature

2. On April 20, 1918, the plaintiff deposited a sum of Rs. 2,000 with the defendant, on condition that the defendant would repay the like sum with interest at 6 per cent per annum on demand.

3. On April 1, 1925, the plaintiff demanded payment of the principal and interest due to him but the defendant did not pay the amount or any part thereof.

The plaintiff claims—

(1) Payment of Rs. 2,000 principal and Rs. 840 interest upto the date of suit; and

(2) interest from the date of suit to that of payment.

DOWER DEBT (m)

No. 42—Suit for prompt dower

1. The parties are Sunni Muhammedans.

that a deposit differs from a loan (Art. 22 Limitation Act, 1963; *Ghurcharan v. Ram Rakha*, 171 I. C. 506, 1937 (Lah.) 81 case under corresponding Art. 60 of the Act of 1908). The Madras High Court has held that a suit could be instituted without demand but the ruling appears to have lost any force by reason of the later Privy Council ruling in *Mohammad Akbar v. Attar Singh*, 63 I. A. 279, 1936 (P. C.) 171, 162 I. C. 454, in which it was held that a demand was necessary before suit. Such demand may be waived by contract or by repudiation of liability; but a defendant cannot both repudiate the liability and plead want of demand (*Nirpendra Nath v. Arunchandra*, 1940 (Pat.) 129 Art. 60 was held to apply not only to a suit against a regular banker, but against every one who is, with regard to the particular transaction in suit, a banker as regards the particular plaintiff (*Motigavri v. Naranji*, 102 I. C. 408, 19 Bom. L. R. 423), and when the deposit was made under an agreement that it should be payable on demand (*Ammalu v. Narayanam*, 111 I. C. 210, 51 M. 549, 1929 (Mad.) 509). When the deposit is made for a fixed period the money is payable on the expiry of that period and no demand was held to be necessary, Art. 115 (and not Art. 60) were held to apply to such cases (*Sfema v. Banerji*, 164 I. C. 412, 1936 (Rang.) 338) but the Patna High Court held that in such cases the money was payable on demand after the fixed time and Art. 60 was applicable (*Nokhlal v. Mojiban*, 182, I. C. 831, 1939 (Pat.) 261). Now Articles 60, 66 and 115 have been replaced in the Act of 1963 by Articles 22, 28 and 55 respectively.

Defence : If the defendant is not a regular banker, he may raise a question of limitation by pleading that it was a case of loan and not of deposit. A banker may plead that there was a condition of a previous notice before payment.

(m) Dower, under the Muhammedan Law, is a debt which must be paid according to agreement. The court has no power to reduce the

2. On December 20, 1921 the plaintiff was married to the defendant and at the time of the marriage it was verbally agreed between the plaintiff and the defendant (Or between Sadulla, father of the plaintiff acting for the plaintiff who was then a minor and Chand Khan, father of the defendant acting for the defendant who also was then a minor) that the dower debt of the plaintiff should be Rs. 15,000 out of which sum Rs. 5,000 should be prompt (Or that Rs. 15,000 should be the dower, debt. It was not specified what portion of the said amount was to be prompt, but the plaintiff claims that Rs. 5,000 be held to be prompt), (Or, by a *Kabinama* dated December 20, 1921, executed by the defendant at the time of his marriage with the plaintiff, the defendant agreed to pay Rs. 5,000 as prompt dower).

[N. B.—These are three precedents for separate suits based on different allegations. A plaintiff may base her suit alternatively on the express contract or on her right to have a portion of the dower adjudged as prompt. In that case, after setting out the allegations as in para. 1 (without the matter within the second brackets) the plaintiff should add the following para :

contractual amount, except in Oudh and Ajmer-Merwara. (*Mahomed Sultan v. Sarajuddin*, 161 I. C. 300, 1936 (Lah.) 183). A widow obtaining possession of her husband's property in lieu of dower has a lien on the property for the dower, and may retain it until the debt is paid, but such possession must have been lawfully obtained and not adversely to the other heirs (*Isbar Fatima v. Anwar Fatima*, 182 I. C. 801 (2), 1939 (ALL.) 348). This lien is according to some H. C.'s negotiable and transferable (*Cooverbai v. Hayatbi*, 1943 (Bom.) 372; *Beeju v. Moorthuja*, 1920 (Mad.) 666, 53 I. C. 905, 43 Mad. 214). The correctness of this view was doubted by P. C. in *Mst. v. Miana Cb. Vakil*, 1925 (P. C.) 63, 86 I. C. 579. Even in such cases, she has no charge on the property and a suit for dower is always one for a personal decree (*Kaniz Fatima v. Ramanandan*, 21 A. L. J. 269, 45 A. 384; *Muniram v. Mukbtor*, 1940 All. 521, 1940 A. L. J. 789; *Zabunnissa v. Nazir Hasan*, 1962 All. 197), and a *bona fide* purchaser due value from the heirs gets an unassailable title (*Saiad Qasim v. Habibur Rahaman*, 27 A. L. J. 777, 31 Bom. L. R. 879, 33 C. W. N. 926, 57 M. L. J. 361, 1929 (P. C.) 174), but a widow in possession can ask the court ordering execution sale of the property to declare her right to retain possession until payment of dower (*Mt. Ghafooran v. Ramchandra*, 1934 (All.) 168). In the Punjab it has been held that if there are no outstanding debts, dower debt will be a charge on the husband's assets (*Mt.*

“Alternatively, if it be found that there was no agreement that Rs. 5,000 should be prompt, the plaintiff will ask the court to hold in the circumstances, that Rs. 5,000 should be declared to be prompt.”]

3. On August 22, 1922, the plaintiff demanded of the defendant payment of Rs. 5,000, but the defendant refused to pay it and has not paid it or any part thereof.

The plaintiff claims Rs. 5,000 (or, Rs. 5,000 or any other sum this court may hold to be reasonable as the plaintiff's prompt dower), with interest from the date of suit to that of payment.

No. 43—Suit for dower after dissolution of marriage

1. The plaintiff was married to the defendant (or to Sadulla, the deceased father of the defendant) on June 20, 1911, and it was verbally agreed, at the time of the marriage, between Iftikhar Uddin, father and guardian of the plaintiff, acting for the plaintiff who was then a minor, and Abdulla, father and guardian of the defendant (or of Sadulla) acting for the defendant (or for Sadulla), who also was then a minor, that the plaintiff's dower should be Rs. 8,000 out of which half was to be prompt and half deferred.

Nawab Begum v. Husian Ali, 171 I. C. 831, 1937 (Lah.) 589). If it is against the heirs of the husband, the suit should be for recovery of the money from the assets of husband. If all the assets are in her own possession, she cannot sue the heirs for dower (*Mirza v. Shahzadi*, 19 C. W. N. 502). A widow in possession of her husband's property in lieu of dower cannot sell the property and if she does, the heirs can recover it without paying the debt (*Sitaram v. Ganesh*, 101 I. C. 683, 4 O. W. N. 330). Prompt dower can be demanded at any time after marriage and consummation is not a condition of its payment (*Husain v. Gulab*, 35 B. 386, 11 I. C. 558, 13 Bom. L. R. 511; *Pukbraj v. Hidayat*, 1938 (Pesh.) 72, 178 I. C. 182), nor does consummation of marriage debar a wife from suing for her prompt dower. (*Mohammad Taqi v. Farmoodi*, 1941 (All.) 181, 195 I. C. 353, 1941 A. L. J. 118). It should be claimed within three years of the demand being refused, but, if, it is not demanded and refused, it can be claimed along with the deferred dower. Some times the nature of the dower, is not specified in the contract. The whole of it is then taken to be prompt under the Shia Law (*Masthan v. Assan*, 23 M. 371 (P. C.) but under the Sunni Law, the court can declare any reasonable portion to be prompt and the rest will be deferred (*Mohammad Subban*

2. The defendant divorced the plaintiff at her father's house on August 3, 1924 by uttering the words "I divorce you" three times before the plaintiff. (Or, the said Sadulla died on August 3, 1924, and plaintiff and the defendant have since then been in possession of the whole of his property, according to their legal shares.)

3. The defendant has not (or the said Sadulla, or the defendants have not) paid the said sum of Rs. 8,000 or any part thereof. The plaintiff never made any demand of her prompt dower during the continuance of the marriage.

4. The plaintiff has made a deduction of $\frac{1}{8}$ th of the debt from her claim, in view of the fact that she is herself owner and is in possession of her legal $\frac{1}{8}$ th share in the property of the said Sadulla and is thus liable to pay $\frac{1}{8}$ th share of his debts.

The plaintiff claims Rs. 8,000 (or, Rs. 7,000) with interest from the date of suit to that of payment, from the defendant or from the assets of Sadulla in the hands of the defendants.

Ullah v. Sagbir, 17 A. L. j. 625, 50 I. C. 740). The proportion will depend on custom, and in the absence of custom, on the status of the parties and the amount of dower (*Mangat v. Mst. Sakina*, 141 I. C. 1211, 1934 (All.) 441; *Maimuna v. Sharafatulla*, 131 I. C. 115, 1931 A. L. J. 197, 1931 (All.) 403; *Nasiruddin v. Amatul Mughni* 1948 Lah. 135, I. L. R. 1947 (Lah.) 565. It has been held in *Nasiruddin v. Amatul Mughni* (ibid) that in the absence of any evidence presumption of half and half may be raised. The court has even power to award the whole amount as prompt (*Husain Khan v. Gulab*, 35 B. 386). In Madras it has been held that the whole will be presumed to be prompt even if the parties are Sunnis (*Sheikh Mahomed v. Ayesha*, 1937 M. W. N. 1077). A wife can base her claim on an express agreement about prompt dower and in the alternative, on Muhammedan Law, and even if she brings a suit on an express agreement she can, in the event of the finding going against her, rely on Muhammedan Law (*Mahbooban v. Mahomed*, 8 Pat. 645, 1929 (Pat.) 207, Contra, *Bhuri v. Asghari*, 94 I. C. 959). If the suit is brought after dissolution of marriage, this question becomes immaterial unless limitation of the ground of demand and refusal during the marriage is pleaded by the defendant. A dower can be fixed even after marriage and the amount fixed at marriage can even be varied by a post-nuptial agreement (*Fatima v. Laldin*, 171 I. C. 421, 1937 (Lah.) 345; *Chan Pir v. Fakar Shab*, 1940 (Lah.) 104, 189 I. C. 725). If a Sunni governed by Hanafi Law divorces his wife before consummation, the wife can get only half the dower, even though the whole is prompt (*Tajbi v. Nattar*, 1940 (Mad.) 888, 1940 M. W. N. 864).

No. 44—Suit for dower by wife's heirs against husband's heirs

1. On April 20, 1908, one Khuda Baksh was married to one Mt. Ilahi Jan, and, by a verbal agreement between the said Khuda Baksh and the said Ilahi Jan, it was agreed, at the time of the marriage, that the said Mt. Ilahi Jan should have a deferred dower of Rs. 10,000.

2. The said Khuda Baksh died on December 10, 1924, and left the defendants, who are his sons by another wife, and Mt. Ilahi Jan, widow, as his only heirs.

3. The said Mt. Ilahi Jan died intestate on January 15, 1925, leaving the plaintiff, her mother, as her only heir.

4. The dower debt of the said Mt. Ilahi Jan has remained unpaid.

In a suit for dower, it should be stated when and how the amount was fixed, whether before, or after, or at the time of, marriage, and whether with the husband himself or his guardian. It should also be stated whether the dower was prompt or deferred. If prompt dower is claimed, a demand and refusal must be alleged as that is a part of the cause of action (*Nawab Bahadur v. Musammat Kzeoz*, S. D. N. W. P. 180; *Rance v. Rance*, 2 I. A. 235; *Musammat Muluka v. Musammat Jameela*, 11 Beng. L. R. 375). A previous demand is not necessary if the amount of prompt dower is unascertained (*Mohammad Taqi v. Farmoodi*, 1941 (All.) 181, 105 I. C. 353, 1941 A. L. J. 118; *Bibi Behana v. Iqtidar*, 1943 (All.) 184).

If there was no specification in the contract, and the plaintiff claims a portion as prompt, the fact should be stated and it should be alleged that the parties are Sunnis. If the suit is brought after the dissolution of marriage, the date of dissolution should be given, and if any portion of the dower was prompt, it must be alleged that it was not demanded during the continuance of the marriage, or that it was demanded and refused within three years before the suit. Proper dower to be fixed by the court can be claimed even if there was no contract for a dower. If there is no satisfactory evidence of the contract of dower, the court will be justified in awarding, *Sharai* dower only *Iftikhar v. Sharif Jehan*, 102 I. C. 838, 4 O. W. N. 150, 1927 (Oudh) 194). The amount of dower cannot be less than 10 dirams, which is equivalent to Rs. 3 or 4 (*Asma v. Abdul Samad*, 32 A. 167). In any case, it is not necessary to allege the social status of the parties or the amount of dower of other members of the family of the wife, as they are mere evidence.

When a wife's heirs after her death bring a suit against the husband reduction must be made in proportion to the husband's legal share as one of the heirs of his wife. When a claim is brought after the death of the husband, there should be a reduction in proportion to the share of assets inherited by, and in possession of, the widow, If there is

5. Musammat Ilahi Jan was in possession of only one house (being No. 25, Cotton Street, Calcutta) out of the estate of the said Khuda Baksh, and the plaintiff is at present in possession of the said house. The whole of the rest of the estate is in the possession of the defendants. The plaintiff offers to surrender possession of the said house.

The plaintiff claims a decree for Rs. 10,000 and interest from date of suit to that of payment against the entire estate

an apprehension of other creditors of the husband taking away the property in plaintiff's hands as assets of the husband it is preferable to claim a decree against the whole assets, as, otherwise the plaintiff may be deprived of her share of property and also a part of her dower debt. If a widow is in possession of an undistributed portion of her husband's estate, she can still sue the other heirs in possession of the remaining provided she offers to surrender possession of the estate which is in her possession (*Ghulam v. Sagir-un-nissa*, 23 A. 432), or she may bring an administration suit. In the former case also, the suit really assumes the character of an administration suit. The nature of such a suit and how it should be tried has been fully explained in (*Mirza v. Shahzadi*, 19 C. W. N. 502). In an administration suit the widow can also ask for partition of the residue of the estate amongst all the heirs (*Amir Bi v. Abdul Rahim*, 110 I. C. 276, 1928 (Mad.) 760, 55 M. L. J. 266). In taking accounts of the profits of property in the hands of the plaintiff, the latter is entitled to have reasonable interests on the dower debt, which may ordinarily be 12 per cent per annum, set off against the profits (*Mirza v. Shahzadi*, 19 C. W. N. 502; *Hamira v. Zubeda*, 38 A. 581 (P. C.)). Interest from date of suit to that of realization may be awarded (*Mamuna v. Sharafatulla*, 1931 A. L. J. 197, 131 I. C. 115, 1931 (All.) 403).

Limitation : Under the Act of 1908 was three years and ran in the case of prompt dower from the time when the dower was demanded and refused or, when no demand had been made during the continuance of marriage, from the time when the marriage was dissolved (Art. 103), and, in the case of deferred dower, from the date of dissolution of marriage (Art. 104), or if a time was fixed for payment, then from the expiry of that time (*Sarb Krishan v. Mt. Fatima*, 1937 (Lah.) 859). If the contract was by a registered instrument, the limitation was extended to six years (*Asiatulla v. Danes Md.* 50 C. 253). Under the Act of 1963, all such suits will be governed by the residuary Art. 113, and the limitation would be three years from the date where the right to sue accrues. Dissolution once made gives a cause of action which cannot be renewed if after divorce the parties again live as husband and wife and subsequently the husband again divorces the wife (*Mt. Hayat Khatun v. Abdullah Khan*, 1937 (Lah.) 270). When demand and refusal were made not on one date but on different dates, limitation runs from the date of refusal (*Razina v. Abida*, 1936 A. L. J. 1328, 1939 A. W. R. 1049).

Defences : In addition to the usual plea disputing the amount for dower on all cases, the defendant may, in a suit for prompt dower plead

of Khuda Baksh in the hands of the parties to be realized in any way the court directs. (Or, the plaintiff claims that an account may be taken of the property of the said Khuda Baksh deceased and that the same may be administered under the decree of court).

GUARANTEE (n)

No. 45—Claim on a guarantee of a debt

1. On January 14, 1924, one Ram Ratan was indebted to the plaintiff in the sum of Rs. 464 on account of rent of a holding.

2. On the said date, by a guarantee in writing and in consideration that the plaintiff would give time to the said Ram Ratan for payment of his said debt and would forbear from suing the said Ram Ratan for the said debt until May 14, 1924, the defendant agreed to pay to the plaintiff the said Rs. 464 on May 14, 1924, if the said Ram Ratan failed to do so.

3. The plaintiff gave time to the said Ram Ratan and

that no portion, or a very small portion, was agreed to be prompt. In other suits, it may be pleaded that a substantial portion was prompt, and that the same had been demanded and refused more than three years before suit and claim for it is time-barred. The defendant may plead that the widow has been in possession of the estate of the husband in lieu of dower debt and must account for the profits. He may plead that the wife had relinquished her dower debt in consideration of obtaining a divorce from the husband. But no relinquishment is valid unless the woman was at the time major not according to the Muslim Law but according to the Majority Act (*Najmunissa v. Sirajuddin*, 17 Pat. 303, 1938 P. W. N. 144). But the minority of the husband cannot be pleaded against his contract of dower, for Sec. 2 of the Indian Majority Act does not affect the capacity of any person to make a contract for dower (*Sayab v. Bebee Khathoo*, 29 I. C. 587).

(n) See Section 126 Contract Act. For difference between *Guarantee* and *indemnity* see *Ramchandra v. Shapurji*, 1940 Bom. 315. Briefly speaking, a contract of guarantee differs from that of indemnity in that it implies the existence of three parties and that it is entered into for the security of the creditor and not for the reimbursement of a loss. The guarantee should be a definite undertaking to indemnify and the mere saying by A that B may safely do business with C will not constitute A surety for C (*Mahommed Shamsudin v. Shaw Wallace and Co.*, 184 I. C. 153, 1939 (Mad.) 520). A surety may be sued separately or along with the principal. The contract of guarantee must be alleged as any other contract.

forbore to sue him. The said Ram Ratan failed to pay the said sum on the said day and the same is still unpaid.

The plaintiff claims Rs. 464, with interest from may 14, 1924 at the usual rate of 1 per cent per mensem, under the Interest Act, upto date and further interest upto the date of payment.

No. 46—Suit against surety for payment of rent

(Form No. 12, App, A, C. P. C)

1. That on the day of 19 , at one E. F. hired from the plaintiff, for the term of years, (the house No. , Street), at the annual rent of rupees payable (monthly).

2. That (at the same time and place) the defendant agreed in consideration of the letting of the said premises to the said E. F. to guarantee the punctual payment of the said rent.

3. That the rent aforesaid for the month of 19 , amounting to rupees, has not been paid.

[If, by the terms of the agreement, notice is required to be given to the surety], add—

4. That, on the day of 19 , the plaintiff gave notice to the defendant of the non-payment of the said rent, and demanded payment thereof.

5. That he has not paid the same.

Then, the facts showing the default of the principal should be alleged.

The liability of a surety being co-extensive with that of the principal, the plaintiff can, in the sense of a clear intention to the contrary, sue either of them without suing the other (*Depak Datt v. Secy. of state*, 118 I. C. 429, 1929 (Lah.) and it is not necessary that the creditor should exhaust all remedies against the debtor or should give notice of the principals, default (*Sankanna v. Virupakshappa*, 7B, 146) nor is it necessary to make a demand upon the principal before proceeding against the surety, unless such notice is stipulated in the contract (*Walton Mascall* (1844) M. & W. 452. In *re-Brown's estate* (1898) 2 Ch. 300), a contrary intention was held not be implied even where the contract provided "If you fail to realize the price I will be responsible" (*Kuckreja Ltd. v. Said Alam*, 1941 (Lah.) 16, 193 I. C. 206 this case has, however,

**No. 47—Suit against principal as well as surety
for price of goods**

1. On January 4, 1925, the defendant No. 1 verbally agreed that if the plaintiff supplied any goods upto a limit of Rs. 1,600 to defendant No. 2 on credit, defendant No. 1 would be responsible to the plaintiff for the due payment of their price.

2. The plaintiff accordingly supplied to defendant No. 2 with goods worth Rs. 590 from January 4, 1925 to January 31, 1925.

Particulars :

<i>Date</i>	<i>Goods supplied</i>	<i>Price</i>
*	* *	*

3. The plaintiff sent his bill to defendant No. 2 and a copy of the same to defendant No. 1 on February, 1, 1925 and intimated in that bill that if the same was not paid within one week of presentation, the plaintiff would charge interest at 1 per cent per mensem.

4. Neither of the defendants has paid the plaintiff the said sum of Rs. 590 or any part thereof.

been dissented from in *Narshingh Das v. Trilokchand*, 1961 (Raj.) 247; but it was held to have been express where the contract provided that if the mortgage money could not be realized from mortgaged property, the mortgagee may realize it from the surety. In the latter case, it was held that the mortgagee could not proceed against the surety without first proceeding against the mortgaged property and time begins to run against the surety when the mortgagee fails to recover the whole money from the mortgaged property. (*Daljit v. Har Kishan*, 1940 (All.) 116, 187 I. C. 152). A contract of guarantee cannot be enforced beyond the time provided in its terms (*State of Maharashtra v. M. N. Kaul* A. I. R. 1967 Sc. 1634). If the guarantee is for a limited amount only, the limit must be specified in the plaint as the surety cannot be made liable for more.

A person sought to be made liable as surety should undertake to perform the promise or discharge the liability of third party in case of his default. (*Bitton Bibi v. Kuntu Lal*, 1952 All. 996.)

Defence : The surety can plead any fact making the guarantee invalid, e.g., misrepresentation concerning a material part of the transaction or concealment of a material circumstance (Secs. 142 and 143). He may plead that he has been discharged by any act or conduct of the plaintiff. Such act or conduct should be specifically alleged and it is

The plaintiff claims—

(1) Rs. 590, with Rs. 35 as interest from February 8, to date of suit.

(2) Further interest from date of suit to that of payment.

[For precedents of suits on security bonds *see* under "Bonds."]

HEIR (o)

No. 48—Suit on a bond against the executant's son who was member of a joint family

1. The defendant is the son of Ramadhin deceased and was a member of a joint Hindu family with the said Ramadhin at the time of the latter's death. The said Ramadhin died on August, 1923, and defendant is in possession of the property of the said joint family.

not sufficient merely to say that he has been discharged. Acts and conduct which operate as a discharge of surety are laid down in Secs. 133 to 139 and 141 Contract Act. If the employer is a servant whose fidelity has been guaranteed continues to employ him even after a proved act of dishonesty without notice to guarantor, the surety is discharged. *Radha Kant Pal v. United Bank*, 1955 Cal. 217. The creditor's omission to sue debtor within the period of limitation does not according to the Bombay, Calcutta and Madras High Courts, and Nagpur Judicial Commissioner's Court operate as discharge of the surety (*Sankana v. Virupakshap*, 7 B. 146; *Krishto Kisore v. Radhe Raman*, 12 C. 330; *Subramania v. Gopala*, 33 M. 350; *Narain Das v. Nanu*, 116 I. C. 421, 1929 (Nag.) 145), but the Allahabad High Court has taken a contrary view in *Ranjit Singh v. Naubat*, 24 A. 504 and *Jogmohan v. Gatali*, 1930 A. L. J. 1054; nor does the dismissal for default of a creditor's suit against the principal in a Foreign Court (*The Bharat National Bank v. Thakurdas*, 37 P. L. R. 92). But in a subsequent case these Allahabad cases were over-ruled by the said High Court and it was held that if a creditor allowed the execution of his decree to be time-barred against the principal debtor the surety was not discharged. *Aziz Ahmad v. Sber Ali*, 1956 All. 8 F. B; *Kashi Ram v. Collector*, 1958 Cal. 530.

(o) An heir is not personally liable for the debts of his ancestor, not even a Hindu son (*Lalta v. Gajadhar*, 1933 A. L. J. 550, 1933 (All.) 235; *Baijnath v. Banwari*, 134 I. C. 160, 12 Pat. 961). Ordinarily the assets of the debtor are liable and the plaintiff should claim a decree not against the heir but against the assets of his debtor in the hands of the heir. It is not necessary to specify the assets or to prove them, if a legal heir is sued (*Shanker Lal v. Abdul Rahman*, 20 I. C. 407 Nag; *Shanker Lal v. Ganesh, Singh* 1929 (Nag.) 170, 89 I. C. 236; *Rajaram v. Nathu*, 120 I. C. 333 (Nag.)). But the Allahabad High Court has held that if it is proved that the defendant has not received any assets, the suit must

2. On January 2, 1922, the said Ramadhin borrowed Rs. 500 from the plaintiff, and in consideration of the loan, executed a bond agreeing to pay Rs. 500 on demand, with interest at 12 per cent per annum with half-yearly rests.

The plaintiff claims a decree for Rs. as per account given below, with interest from date of suit to that of payment against the joint family property of the defendant and the said Ramadhin in the defendant's hand.

No. 49—Like suit against a son who was not a member of a joint family, and against another not heir

1. The defendant No. 1 is the son of Ramadhin deceased, and defendant No. 2 is the widow of Sheo Prasad, a predeceased son of the said Ramadhin.

be dismissed (*Tara Chand v. Dharman*, 1936 A. W. R. 32). The Lahore High Court has held that the plaintiff should allege in the plaint and prove, if it is not admitted, that the defendant came into possession of any property of the deceased before any decree can be passed (*Bhagmal v. Garimju*, 83 I. C. 810, 1923 (Lah.) 471). It has been held in *Pahalwan v. Janki*, (40 A. 17), that even when the deceased was a member of a joint family, a decree can be passed against the widow to the extent of any self-acquired property that she may have inherited, even without proof that there was any self acquired property. This, it is submitted is a very extreme view, for in a joint family there is normally no heirship, unless there is self-acquired property, and, unless the existence of such property is proved, there should be no decree against the person who would be the heir if there were such property.

But if any person who is not a legal heir is sued on the ground, that he is in possession of the assets, the plaintiff must allege and prove that the defendant is in possession of any assets of the debtor and is therefore a legal representative, otherwise no decree can be passed. Even in cases where the assets are in possession of an intermeddler, it is safer to join the legal heir also as a defendant with the intermeddler. The risk of not joining the legal heir is well illustrated in *A. Narasimaiah v. Jawantharaj*, 101 I. C. 110, 52 M. L. J. 229, where both were sued but the plaintiff exempted the real heir and obtained a decree against the intermeddler who was in possession of the assets. Afterwards the real heir sued the intermeddler and obtained possession, and the plaintiff decree-holder could not follow the property in the hands of the real heir as the latter had been exempted from the decree. A decree against a supposed heir is not binding on the real heir (*Angad v. Neelana*, 93 I. C. 625 (Mad)). But if a plaintiff, without any fraud or collusion, sues a person who would ordinarily be the legal representative in ignorance of circumstances making another person the legal representative, then the decree

2. As in the last precedent.
3. The said Ramadhin died in August, 1923.
4. On the death of the said Ramadhin, the defendant No. 2 has got her name entered in the village papers on a half share in the *zamindari* property of Ramadhin, and she is in possession of the said half share.

The plaintiff claims decree for Rs. as per account given below with interest from the date of suit to that of payment against the assets of the said Ramadhin in the hands of the defendants—

obtained against the former will be binding on the latter (*Pulikke v. Thappli*, 108 I. C. 409, 1928 (Mad.) 243). In certain circumstances persons wrongly impleaded as legal representatives have been held to represent the estate and the decree has been held to be binding on the true representatives when the plaintiff acted *bona fide* (*Mt. Chandri v. Hira Lal*, 1933 Rang. 73, 144 I. C. 663), but in all such suits plaintiff must be diligent to find out and implead all the representatives (*Mt. Karan v. Matwal*, 1933 (Lah.) 380, 141 I. C. 580).

Where a person takes possession of the estate of the deceased and appropriates or disposes it of, he is an intermeddler and a decree can be passed against him as legal representative, and if the property of the deceased is not forthcoming in executinn proceedings the decree can be executed personally against him to the extent of the value of the property which has come to his possession (Sec. 52 (2), C. P. C.). The Oudh Court has, however, in a case confirmed a personal decree passed in the very beginning on being satisfied at the trial that the defendant could not account for the property received by him (*Mihpal v. Babu Lal*, 77 I. C. 306 Oudh). The learned J. C. based the decision on the authority of Section 52 and of Madras decision (20 M. 456). The former section does not, it is submitted, apply, and the Madras decision appears to be too wide.

The Allahabad High Court in another case took a very strict view and held that when the deceased was a member of a joint Hindu family with his son, his creditor could not obtain any kind of decree against a separated brother who had appropriated the deceased's crops (*Lachmi Chand v. Suraja*, 103 I. C. 338). It was held that the family being joint there were no estate of the deceased with which the brother could intermeddle, until decree was passed which alone could make it an asset of the father under Sec. 53.

If the defendant was a member of a joint Hindu family with the debtor at the time of the latter's death, he can be sued if the decased had any separate property and the defendant is his legal heir or is in possession of the assets. But the joint family property will not be laible unless—(1) the defendant who is in possession of the property is the son, or (2) the debtor was the manager of the family *and* the debt was cantracted for the benefit of the family. If the defendant is the son, the

No. 50—Like suit against a member of a joint Hindu family not being the son, when the executant had no separate property

1. The defendant No. 1 is the brother and defendant No. 2 is the nephew of one Ramadhin.

2. The said Ramadhin died in July 1923 and was, at the time of his death, a member of a joint Hindu family with the defendants, and was the head and Manager of the said family. The defendants are in possession of the property of the said family.

3. Same as No. 2 of Precedent No. 48.

4. The said Ramadhin had taken the said loan for the expenses of the marriage of his daughter Mt. Raj Kali.

The plaintiff claims a decree for Rs. as per account

plaintiff need not allege the necessity for the loan, as the defendant cannot contest his liability to pay the debt from the joint family property unless he alleges and proves that the debt was illegal or immoral. In any other case, the plaintiff must allege that the debtor was a member of a joint Hindu family and was its manager, and must also allege the legal necessity for loan. The author knows several cases in which brothers were sued for the debts of their deceased brothers but the suits were dismissed on account of the plaintiff's foolishness. When asked whether the family was joint, he admitted that it was so under the impression that that would make the defendant's liability more certain, but could not prove the necessity for the loan. Had the plaintiff taken up the position that the defendant was separate he could have got a decree against the assets without further proof. The defendant in some cases alleged separation under the misapprehension that that would not make him liable, but, had he alleged jointness, he would have been able to compel the plaintiff to prove necessity for the loan and the fact that the debtor was the manager.

Defence : Usually is a denial of the debt. This may be coupled with plea of discharge in the alternative, as this inconsistency is permissible to defendant because he is a stranger to the transaction. If he was a member of a joint Hindu family with the debtor and was not the latter's son and the plaintiff has not alleged in the plaint that the debtor was the manager or that the debt was taken for family necessity, the defendant should simply plead that on the plaintiff's own showing the family property is not liable. If the defendant is debtor's son, he may plead that the debt was illegal or immoral, but a mere plea that it was not taken for family necessity is not available to him. If an heir is sued on the allegation that he is in possession of assets, but really he has no assets, it is best to make a statement to that effect, although this would not prevent a decree being passed and cannot, therefore, be taken as a plea in defence.

given below with interest from date of suit to that of payment against the joint family property of the time of the said Ramahin in the hands of the defendant.

HIRE (p)

No. 51—Suit for hire and for damages for breach of agreement

1. By a verbal agreement between the parties on December 10, 1923 the plaintiff let certain articles of furniture and other goods on hire to the defendant for 16 days at Rs. 100 and the defendant undertook to use them in a careful and reasonable manner during the continuance of such hiring, and to redeliver the same at the expiry of the term of hire to the defendant in as good a state and condition as they were in when let to him, subject to reasonable wear and tear incidental to such use.

2. The defendant used the said goods in so negligent and careless a manner that they were greatly damaged and deteriorated otherwise than by reasonable wear and tear.

Particulars

(a) A hole was burnt in the middle of the green carpet thereby rendering it of no value. The carpet when delivered to the defendant was of the value of Rs. 60.

(p) The position of a hirer of goods is that of a bailee, and he should take the same care as a reasonably careful man may be expected to take of his own goods of the same bulk, quality and value (*Shantilal v. Tarachand*, 1933 All. 158, 142 I. C. 691). He can be sued for damages if the articles hired are damaged owing to his negligence or carelessness. In a suit for such damages or for hire money, the agreement must be pleaded, and the terms, breach of which has been made by the defendant, must be pleaded with the exact nature of the breach. If the breach pleaded is a statutory duty, the duty need not be pleaded as that would be pleading law. It would be sufficient to plead the breach only. Particulars of the damages claimed must be given. A suit for compensation for damage to the articles was held to be governed by Art. 115 and not 36 (*Holloway v. Holland*, 1933 (Oudh) 518, 145 I. C. 1001). Under the Limitation Act. of 1963, such a suit would be governed by Art. 91 (b) or 55.

Defence : It is useless to deny the terms of the hire, if they are not extraordinary. The defendant may plead that the damage caused

- (b) The glass stand of the big lamp was broken and will cost Rs. 10 to repair.
 - (c) The velvet cushion was spoiled and rendered of no value by having kerosene oil spilt over it. When delivered to the defendant it was of the value of Rs. 100.
 - (d) The burner of the Jost fan was damaged and will cost Rs. 15 to repair.
3. The defendant has not paid the hire money, or any part thereof.

The plaintiff therefore claims :—

- (1) Rs. 100 on account of hire money.
- (2) Rs. 185 damages.
- (3) Interest from date of suit to date of payment.

INDEMNITY (q)

No. 52—Suit on an express indemnity

1. On November 20, 1921, the defendant sold a house to the plaintiff representing that there was no encumbrance on it, and that the one originally created in favour of Ram Chandra had been discharged. By the sale-deed executed by the defendant the same day, the defendant covenanted

was caused by *vis major*, or that he had taken as much care of the goods, as a man of ordinary prudence would, under similar circumstances, take of his own goods, and that the damage was caused by pure accident or that the defects pointed out by the plaintiff existed at the time of hiring the goods.

(q) See Section 124, Contract Act. The contract may be express or implied. As to what damages a promisee can recover, see Section 125, Contract Act. In a suit for damages for breach of contract of indemnity, the contract must be alleged with details as to whether it was express or implied, whether it was oral or in writing: its terms, the breach of which is the cause of action for the suit, with the breach thereof, should also be alleged, and then the damages with particulars. A contract by an accused to indemnify his surety is not enforceable (*Prasanno Kumar v. Prakash*, 19 C. W. N. 329). A purchaser subject to encumbrances impliedly agrees to indemnify the seller against the encumbrances (*Rama v. Venkatalingam*, 1933 M. W. N. 486). Though ordinarily cause of action for a suit for breach of contract of indemnity arises when the plaintiff is actually damaged (*Shanker v. Laxman*, 1940 (Bom.) 161, 188 I. C. 663) and suit is usually brought after the

that if any prior encumbrance was claimed by any one and the plaintiff had to pay anything on account of any such prior charge, the defendant should indemnify him against such loss.

2. The said Ram Chandra instituted in this Court a suit on the basis of his prior hypothecation bond, and on September 23, 1923, obtained a decree for sale of the said house.

3. The plaintiff had thus to pay, and he has in fact paid on January 26, 1923, Rs. 2,350, in full discharge of the decree of the said Ram Chandra.

4. The defendant has not indemnified the plaintiff against the loss thus sustained by him.

The plaintiff claims Rs. 2,350, with interest from date of suit to that of payment.

No. 53—Ditto

(Form No. 20, Appendix A, C. P. C.)

1. On the day of 19 , the plaintiff and defendant, being partners in trade under the style of A. B. and C. D., dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

plaintiff has suffered damages by actual payment, yet it was held in a case by the Allahabad High Court that the passing of a decree against the plaintiff was sufficient to give him a cause of action (*Chiranjilal v. Naraini*, 41 A. 395, 17 A. L. J. 394, 51 I. C. 158). The question whether a new cause of action would accrue after the decree is realized and the plaintiff is actually damnified was left open. A full Bench of five Judges held in *L. Shanti Saroop v. Janak Singh*, (1957 A. L. J. 875) approving the decision of an earlier full Bench in *Tilak Ram v. Surat Singh* (1938 A. L. J. 455) that if a purchaser undertakes to discharge an earlier encumbrances but fails to do so, the vendor has two alternative causes of action. He can before suffering any actual damage bring an action to have himself put in a position to meet the liability which the purchaser has failed to discharge. He can also, if as a result of that failure he has already incurred loss, claim the amount of loss by enforcing the contract of indemnity. In a Madras case a debt of a mortgagee due from certain

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the day of 19 , (a judgment was recovered against the plaintiff and defendant by *E. F.*, in the High Court of Judicature at , upon a debt due from the firm to *E. F.* and on the day of 19 ,) the plaintiff paid rupees (in satisfaction of the same).

4. The defendant has not paid the same to the plaintiff.

No. 54—Suit on an implied indemnity

1. The plaintiff sold certain zamindari property to the defendant by a sale-deed, dated July 15, 1921, and, out of the consideration, left Rs. 2,000 with the defendant, directing him by the said sale-deed to pay the same to one Ram Chandra, on account of principal and interest up-to-date, due to the said Ram Chandra from the plaintiff under a mortgage bond, and to obtain by such payment redemption of the mortgage for the plaintiff. The defendant accepted the sale-deed on the aforesaid terms and took possession of the property sold to him.

cosharers was, on partition, divided between them in certain proportions and an indemnity deed was executed under which each agreed to indemnify the other against the liability imposed on him. The mortgagee threatened to sell plaintiff's property for realization of the whole debt and defendants on being called upon by plaintiff did not pay the share due from them. On plaintiff's suit the plea of the defendants, that the suit was not maintainable as plaintiff had not yet suffered any damage was not accepted (*Ghulam v. Mohammad Ali*, 1943 (Mad.) 360). In *Ram Ratan's* case it was also held that in a case like the one in precedent No. 49, when no time is fixed in the contract for payment the undertaking should be taken to be to pay on demand either by the promisee or by the person to whom payment is to be made. Therefore such a demand is necessary to complete the cause of action and should be made and alleged in the plaint.

Limitation : Under the Act of 1908, it was held in *L. Shanti Saroop v. Janak Singh*, supra, that if the vendor claimed to be put in a position to meet the liabilities which the vendor had failed to satisfy, the suit would be governed by Art. 116 or 115 depending on whether the deed was registered and limitation would start from the date on which the purchaser ought to have discharged the liability. If, however, the suit was for enforcing the contract or indemnity, the Article applicable would be Art. 83, and limitation would run from the date upon which the vendor is damnified. Under the limitation Act of 1963, the limitation in either case will be three years under Art. 55 or 113.

2. The defendant did not pay the said Rs. 2,000 or any part thereof to the said Ram Chandra, though the plaintiff asked him by a registered notice dated September 20, 1922 to do so.

3. The said Ram Chandra obtained a decree on foot of the mortgage against the plaintiff and the plaintiff had to pay, and he did pay on June 4, 1925, to the said Ram Chandra, a sum of Rs. 2,543 on account of the debt and costs due under the decree.

4. The defendant has not indemnified the plaintiff against the loss thus sustained.

The plaintiff claims Rs. 2,543 and interest from date of suit to that of payment.

INJUNCTION (r)

No. 55—Suit for prohibitory injunction to restrain breach of contract

1. The plaintiff let plots Nos. 142 and 678 in village—to the defendant, by a deed of lease, dated July 6, 1920, for cultivation purposes for 7 years, and the defendant agreed by the deed of *kabuliat* which he executed the same day, not to use the land for any other purpose.

2. The defendant has, since July 1 last commenced to dig earth from the said plots for the purposes of his adjoining brick-kiln.

Defence : The defendant may plead any facts showing that he had been excused by the plaintiff, or was prevented by the plaintiff's own misrepresentations, from performing his contract. For instance, he may show that the money left with him for discharge of a prior mortgage was insufficient and the mortgagee would not accept part payment, or that the plaintiff had asked him to make the payment in his presence but did not afterwards turn up.

(r) Injunctions which are necessary to prevent breach of a contract are dealt with here. Those necessary to prevent tort will be dealt with at the proper place. A negative contract, *i. e.*, an agreement not to do a certain act, is enforced by an injunction, which is either prohibitory or mandatory. Prohibitory injunction is necessary in such cases to prevent multiplicity of suits. **The plaint should allege the contract, and particularly the terms of the negative contract, breach of which is complained of, with the act of breach.** It should also be

3. The defendant threatens and intends, unless restrained from so doing, to continue to dig earth from the said plot.

The plaintiff claims a perpetual injunction restraining the defendant, his servants, or agents, from digging earth from any portion of the said plots Nos. 142 and 678.

No. 56—Suit for an injunction restraining waste

(From No. 35 of Appendix A, C. P. C.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of (*describe the property*).

2. The defendant is in possession of the same under lease from the plaintiff.

3. The defendant has cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale without the consent of plaintiff.

4. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

alleged that the defendant threatens and intends to repeat the breach of contract complained of. Circumstances from which such intention can be inferred should not be alleged, as that would be pleading evidence. For instance in the case of Precedent No. 57 it would be tempting to plead that the defendant has prepared a plan of the building he wants to build on the plot, that he has filed that plan in the office of the Municipal Board, that he has obtained the Board's permission to build the house, and that he has given a contract for the building, but all these facts are only evidence of the defendant's intention and threat.

A prayer for an injunction may be added to a suit for possession or damages, when there is a proper case for an injunction. It has, however, become usual to add such a prayer to all suits for possession or damages for act of tort or trespass committed by the defendant. This should be avoided, and unless the plaintiff can make out case for an injunction, he should not claim it. When he claims it, he must disclose facts entitling him to it. There must be imminent danger, and the damage apprehended must be very substantial. The fact that a plaintiff instituted the suit on the last date of limitation was itself regarded in a case as negating an imminent danger (*Nathu v. Sheosa*, 1926 (Nag.) 25). Before a mandatory injunction is granted there should be an obligation on the defendant to perform the act. If a man trespasses

No. 57—Like suit for mandatory and prohibitory injunction

1. By a lease, dated January 20, 1921, the plaintiff let a plot of land lying to the west of his residential house in Mohalla Bisati in the town of Bareilly, to the defendant, for 10 years, for the purpose of using it for storing timber. The defendant executed a *kabuliat* on the same date, accepting all the terms of the lease and expressly agreeing not to use the land for any other purpose.

2. In the month of April, 1925, the defendant commenced to erect a house on the said land and has already constructed one room in the western portion of the plot.

3. The defendant further intends and threatens to cover the whole plot by other buildings, unless restrained from so doing.

on A's land and plants trees, the remedy of A is to sue for possession of land and not for removal of trees (*Ewin v. U. Po*, 104 I. C. 139, 5 R. 404).

Under sections 38 and 39 of S. R. Act 1963 the plaintiff may pray for a perpetual or mandatory injunction to prevent the breach of an obligation existing in his favour. Where there is no obligation, contractual or otherwise on the part of the defendant towards the plaintiff, the plaintiff is not entitled to mandatory or perpetual injunction. (*Nand Lal v. Provu Dayal*, A. I. R. 1952 Calcutta 74).

An injunction founded on tort, or breach of trust, or on the breach of any legal duty can be granted provided the other circumstances are present. (*Parul Bala Roy v. Srinivas Chownud*, 1952 Cal. 364).

In a suit for declaration where no relief for a mandatory injunction is prayed for, the Court has jurisdiction to issue an injunction merely is prayed for, the Court has jurisdiction to issue an injunction merely to preserve the *status quo*. It has no jurisdiction to deprive one person from the possession of a certain property which he holds or to give possession to one party after taking it from another. (*Meston School Society v. Kashi Nath Misra*, 1950 A. L. J. 795).

Where the right infringed is not substantial perpetual injunction cannot be claimed. (*Shyam Sundar Sharma v. Ganga Prasad*, D. L. R. (All.) 329).

Limitation : Three years under Art. 113, Lim. Act, 1963. In some cases Sec. 22, Limitation Act, 1963 will be of much help, but unreasonable delay may be fatal as the relief is discretionary (*Mt. Bhagwati v. Mohan Singh*, 1934 (Lah.) 147).

Court-fees : Valuation for both court-fee and jurisdiction purposes is that put upon his claim by the plaintiff himself. This is arbit-

The plaintiff claims—

(1) An order that the defendant to pull down and remove the building which he has already erected on the said plot.

(2) A perpetual injunction restraining the defendant from erecting any other building on the said plot.

INTEREST (s)

No. 58—Claim for contractual interest

The defendant had, at the time of purchasing the cloth verbally agreed to pay interest on price of cloth purchased by him at 12 per cent per annum.

rary. But in U. P. such suits should be valued at not less than one-fifth of the market value of the property involved on or affected by, the injunction, or Rs. 200, whichever is greater.

Defence : The defendant may plead that the breach is not a substantial one (*Shiam Sunder Sharma v. Ganga Prasad*, 5 D. L. R. (All.) 329), that it was only temporary, and, in case of prohibitory injunction, that he does not intend to do the act apprehended, or that he did all the acts complained of with the previous permission, express or implied, of the plaintiff. If the facts are such that he can show that he entertained a *bona fide* belief that he had a right to make the construction, he can plead acquiescence of the plaintiff in the acts complained of. (For the exact requirements of this plea, see Chap. XIV).

(s) Where interest is not payable by agreement or under statute, the mere detention by the defendant of money due to the plaintiff is no ground for awarding it. (*Teja v. Choga*, A. I. R., 1950 Ajmer 50; *Bengal Nagpur Ry. Co. Ltd. v. Ruttanji Ramji*, 1938 A. L. J. 169; *Lakshmi Jns. Co. v. Bibi Padmavati*, 1961, Punj. 253; *Mahabir Pd. v. Durga Dutt*, 1961 (S. C.) 990). Interest cannot be awarded on amount given as damages (*Dominion of India v. All India Reporter Ltd.*, 1952 Nag. 32). Interest can be claimed only when there is a contract, express *Sugar Mull Amir* A. I. R. 1966 All 129 *Union India v. Panipat Woolen mills* A. I. R. 1967 Punj 497 or implied, for its payment, or when it is allowed by some rule of law (*Lala Kalyan Das v. Sheikh Maqghul Ahmad*, 16 A. L. J. 693, 28 C. L. J. 181, 35 M. L. J. 169, 46 I. C. 548 (P. C.) or under a custom or usage of trade (*Juggo Mohan v. Kaisree*, 9 M. I. A. 266). A contract may be implied from the course of dealings (*Gurdatta v. Mt. Bhagwati*, 1933 (Lah.) 1039). A general rule of law is contained in the Interest Act, 1839, under which the court may allow any interest at a rate not exceeding the current rate on all debts or sums certain payable by virtue of some written instrument at a certain time, from such time or if payable otherwise then from the time when demand of payment is made in writing so as to give notice that interest will be charged (*Thanwards Pherumal v. Union of India*, 1955 S. C.

No. 59—Claim for customary interest

1. It is a custom in the grain market at Shamli that on such transactions as aforesaid an interest of 9 per cent per annum is charged.

2. The plaintiff claims interest at 9 per cent per annum.

468). This Act is not applicable when payment of a sum is contingent upon events which may never happen and the amount is ascertainable only if and when those events happen (*Jagmohan Das v. Manik Chand*, 7 M. I. A. 263). Sec. 23, Trust Act, Sec. 61(2) Sale of goods Act and Sec. 80 Negotiable Instruments Act are instances of other specific rules of law allowing interest. In no other cases can interest be claimed (*S. Kripal Singh v. Jwan Mal*, 101 I. C. 644, 28 P.L. R. 184, 9 Lah. L. J. 149); and the popular belief that interest can be claimed in all cases in which plaintiff's money remained in defendant's hands is mistaken. For instance, interest cannot be claimed on unliquidated damages for breach of contract (*Kavutu v. Lakshminarasimha*, 26 I. C. 429; *Firm of Motilal v. Firm of Kishori Lal*, 120 I. C. 482, 11 L. L. J. 537; *E. A. Zippel v. K. D. Kapur* 139 I. C. 114, 1932 (Sindh) 9; *Sukhdial v. Het Ram*, 40 P. L. R. 531; *Gopaldas v. The Municipality, Hyderabad*, 1949 Sind (1) or for tort,

The Supreme Court has, however, held that under Sec. 2 (12) C. P. C. Interest is an integral part of the definition of mesne profits and has to be allowed in mesne profits. *Mahant Narain Dasjee v. Board of Trustees A. I. R. 1965 S. C. 1231*. Thereinfore the Madras decision *Shri Ram Krishna Iyyer v. Rameshwar Iyyer A. I. R. 1938 Mad. 424* that it should be allowed only in exceptional cases is no longer good law. In a Privy Council Case it was held that in the absence of a contract, rate is in the discretion of the Court, and in ordinary circumstances 6 p.c. per annum is the proper rate (*Kedar Nath v. Maharaj Kumar B. Bagheshwari Prasad Singh*, 168 I. C. 145, 1937 A. W. R. 1017, 41 C. W. N. 809, 1937 A. L. J. 1051, 1937 (p. c.) 143. The Allahabad High Court held in (*G. I. P. Railway v. Jugal Kishore*, 1930 A. L. J. 297, 1930 (All.) 132) that interest could be allowed when there was delay in payment of compensation for loss incurred by fall in market. It cannot be allowed on price of articles sold, unless there was notice that interest would be claimed (*Parshotam v. Bitthal*, 54 I. C. 431, All; *Raghoomal v. Nannebmal*, 1933 (Lah.) 127, I. C. 247), (contra; *Empire Engineering Co. v. Municipal Board, Bareilly*, 27 A. L. J. 674, 119 I. C. 853, 1929 (All.) 801) where interest at 12 per cent per annum on the price of goods sold was allowed by way of damages, and *Sunilal v. Herbare*, 7 Mys. L. J. 63 where interest at 9 per cent per annum was allowed by way of damages on price of goods not paid within the time fixed; or on arrears of maintenance not fixed by contract (*Abid Husain v. Lala Sarju Prasad*, 88 I. C. 163, 1928 (Oudh) 147). Interest cannot ordinarily be decreed as damages under Sec. 73, Contract Act when it is not recoverable under the Interest Act (*B. N. Ry. Co. v. Ruttanji Ramji*, 1938 M. W. N. 646, 1938 A. L. J. 169, 1938 (p.c.) 67, 173 I. C. 15, 42 C. W. N. 859; *Ramineddi v. Sri Muthangi*, 1942 (Mad.) 429). But it can be claimed by way of damages for breach of a con-

No. 60—Claim for interest after notice

The plaintiff sent his bill for the price of the cloth purchased by the defendant, to the defendant, on June 2, 1925, and expressly intimated, in that bill that if payment was not made within one month of presentation, interest at 12 per cent per annum should be charged.

tract for payment of money only when actual loss is proved and not as a compensation for loss or damages presumable in law from non-payment (*Surja v. Pratab*, 26 C. 955; *Parsumna v. Gopal Lal*, 231 C. L. J. 348, 55 I. C. 737; *Khatra Mohan v. Asvini*, 45 I. C. 667, 22 C. W. N. 488; *Raja Nath v. Hira Lal*, 93 I. C. 647; *Raja Ram v. Gajpatti*, 145 I. C. 721, 1933 M. W. N. 498, 1933 (Mad.) 729). Interest cannot be claimed on money advanced by a purchaser to a seller who commits breach of contract to supply the goods. In such cases the proper damages are the difference in contracted and market prices and the plaintiff can recover that and his money, but if he does not claim the former, he cannot urge that he is entitled to interest on his money by way of damages (*Ramalinga v. Muthuswami*, 99 I. C. 609, 24 L. W. 782, 51 M. L. J. 765, (1926) M. W. N. 990 (f. b.)). The whole case law has been well discussed in this case. No interest can be allowed on rent which was payable at a certain rate to the extent of land re-claimed from the year in which revenue was assessed (*Nanchappa v. Vatasari Ittichthara*, 53 M. 549).

Sec. 1 interest act permits interest in all cases where it is now payable by law and this enables the court to award interest by way of equitable relief where circumstances attracting equitable jurisdiction exist, (*Union of India v. Watkins Mayer & Co.* A. I. R. 1966 S. C. 275). Such as where Trustee of a public charitable trust retains trust money uninvested in his hands (*Humukchand v. Phool Chand*, A. I. R. 1965 S. C. 169) But in a suit by a partner for his share of rent realised by another partner interest was not allowed *Vitaldas v. Rupchand* AIR. 1967 S. C. 188. The principles laid down by the Supreme Court in *Thawardas v. Union of India* AIR. 1955 S. C. 468, *Trojan & Co. v. Nagappa* AIR. 1953 S. C. 235, Ct. A. Ct. *Nachiappa Chethia* B. Ct. A. Ct. *Subramaniam Chethiar* 1960 S. C. 307, *Satindra Singh v. Umrao Singh* 1961 S. C. 408, *Mahabir Prasad v. Durga Dutt* 1961 S. C. 990 and the above cases may be looked into. Interest can be allowed on money in an agent's hand after account has been demanded (*Govinda v. Nirri*, 50 I. C. Cal. 747), where the agent is guilty of fraud and has made secrete profits (*Tota Ram v. Zalim Singh*, 1940 All. 69; *Trojan and Co. v. R. M. N. N. Nagappa Chettiar*, 1953 S. C. 235), or on money had and received by the defendant for the use of the plaintiff (*Arunchalam v. B. Raja Rajeshwara*, 42 M. L. J. 74, 1925 (Mad.) 46, or on the plaintiff's share of assets after the demand has been refused (*Maria v. Kadir*, 29 I. C. 275 Mad.) or on the price of property, possession of which has been delivered to the purchaser (*Valluri Surya Prakash v. Bhamidipati Venkata*, 1933 (Mad.) 844, 1933 M. W. N. 127), or on money due to a beneficiary under a *waqf* retained by the *Mutwali* (*Kishor Joaban v. Zafar Muhammad*, 1933 (All.) 186, 1933 A.L.J. 21), or on purchase money sought

No. 61—Claim for interest by way of damages

On the date the money was payable from the defendant under the above contract, the plaintiff had to pay the same amount of money to his creditor.

2. The plaintiff had to borrow money at 9 per cent per annum to pay off his creditor.

3. The plaintiff claims interest at 9 per cent per annum by way of damages.

to be refunded on seller not giving possession (*Municipal Committee, Gujranwala v. Prabh*, 1933 (Lah.) 556, or on plaintiff's share of rents collected by defendant, payment of which is unreasonably detained (*Abdul Jalil v. Mohammad Abdul Salam*, 1933 (All.) 505), or in a suit for contribution (*Ramnathan v. Palinappa*, 1939 (Mad.) 531). The Calcutta High Court refused to allow interest to a principal on money received by the agents from customers *Laman v. Chintamani*, 41 A. 259, 17 A. L. J. 163), but allowed it in another case in which agent's fraud had been proved (*Totaram v. Zalim Singh*, 1939 A. L. J. 1065. The Allahabad High Court allowed interest on rent on the ground of its wrongful detention (*Basantal v. Puranchandra*, 1926 (Cal.) 111. see also *Pattinson v. Bindhya*, 1933 (Pat.) 196, Oudh Chief Court, and Madras and Rangoon High Court allowed a reasonable interest on money lent (*Ambika Singh v. Jagdeo*, 1937 (Oudh) 387; *M. & S. M. Ry. Co. Ltd. v. Satyanarayan*, 1937 M. W. N. 1309; *N. N. Chettyar Firm v. Tan Ma Pu*, 6 R. 411). Lahore High Court did not allow interest apart from contract or interest Act (*Sham Singh v. Nanak*, 136 I. C. 719 Lah.).

In every claim for interest, the contract for its payment, or facts bringing the case within a particular rule of law under which it is claimed should be given. If it is claimed under a custom of trade, the custom must be alleged. If the claim is made on equity, facts entitling the plaintiff to the relief should be stated.

A claim for interest is generally added to that for principal. But if interest is payable under a contract before the principal, the same can be separately sued for.

Defence : The defendant may plead absence of any of the elements making the claim fall within any rule of law. He may plead tender of the principal money, from the date of which his liability for interest cases. He may plead that he was prevented by the creditor from making payment (*Gopeshwar v. Jadab*, 2 C. W. N. 689). Against a contractual rate of interest, he can plead the aid of the Usurious Loans Act or of Sec. 16 or Sec. 74, Contract Act, or that the contract is void as the interest is against that prescribed by law. But in the absence of fraud or undue influence or anything to suggest that the creditor took an undue advantage, mere excessiveness of the interest is no ground for its reduction (*Madhu Mangal v. Gour Sunder*, 60 I. C. 733 Cal; *Nabin v. M. Rabeya*, 5 R. 619, 106 I. C. 181). Under the Usurious Loans Act court can reduce the interest even if defendant does not take the plea in the written statement

No. 62—Suit for interest only

1. The defendant borrowed Rs. 1,000 from the plaintiff under a bond, dated June 9, 1924, payable after 6 years, and by the same bond, the defendant agreed to pay interest on the said Rs. 1,000 at 12 per cent per annum regularly every half-year.

2. The defendant has not paid any interest. The plaintiff claims Rs. 120 on account of interest for the first two half-years.

JUDGMENT (t)**No. 63—Suit on a foreign judgment**

(From No. 11, Appendix A, C. P. C.)

1. On the day of 19 , at
in the state (or Kingdom) of the court
of the State (or Kingdom), in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff—rupees, with interest from the said date.

2. The defendant has not paid the money.

(*Kaderbai v. Fatmabai*, 1944 (Bom.) 25). Even under the Usurious Loans Act high rate is not necessarily regarded as excessive or unfair and creditor may show that the prevailing rate in the locality is nearly the same or that the high rate was justified by the risk the creditor was taking (*Babu Ram v. Jograj*, 27 A. L. J. 1174, 118 I. C. 375). The Act has, however, been amended in U. P. by U. P. Act XXX of 1934. The amendment provided that in certain circumstances rate in excess of those mentioned in Amendment will be deemed to be excessive. For the form of a plea under Sec. 16 Contract Act, see General Defences, "Undue Influence." If the contract is contained in a written document, the defendant cannot plead that he had agreed to the rate as the plaintiff had represented to him that he would charge lower rate, as that would be against Sec. 92, Evidence Act (*Sukh Lal v. Murari Lal*, 1926 (Oudh) 273). Where interest not contracted for is claimed, he can plead that it is excessive.

(t) A suit on the basis of a judgment, would generally be necessitated only in cases of judgments of foreign countries. If the defendant resides in India and satisfaction of the decree cannot be obtained in the foreign territory, a suit may be brought in India on the basis of the foreign judgment. It is not necessary, in such cases, to allege the original cause of action. It is sufficient to allege the judgment and the

No. 64—Suit on a foreign judgment

1. On the 20th day of March, 1920, the King's Bench Division of the High Court of Justice of England, in a suit therein pending between the parties (1924, B. No. 161), adjudged the defendant to be liable to pay to the plaintiff the sum of £200, with interest from the date of judgment to that of realization at 5 per cent per annum.

2. The defendant has not paid the said amount or any part thereof, nor has satisfaction for the amount or any part thereof been obtained by execution.

liability of the defendant under it, and the fact that the defendant had not discharged that liability.

It is also the practice to allege that the foreign court had jurisdiction over the parties or the case, but strictly speaking this is not necessary, such jurisdiction being presumed until the contrary is proved (*Robertson v. Struth*, 5 Q. B. 941; *Henderson v. Henderson*, 6 Q. B. 288; *Vy. N. K. R. M. A. Ramanathan v. S. V. K. Lakshmanam*, 49 I. C. 202 Mad). In order to determine the money claimed on a judgment of an English Court, the rate of exchange prevailing on the date of judgment should be taken into account (*Madhavji v. Ramniklal*, 47 B. 487).

Limitation : Three years from the date of judgment (Art. 101), even though execution may be barred under the law of the Foreign Court (*Jaisukh Lal v. Mohammed Hussain*, 1939 (Bom.) 522). It cannot be extended by reason of any application for review or rehearing made in the foreign court (*Hari Singh v. Mohammad Said*, 102 I. C. 523, 8 Lah. 54, 1927 (Lah.) 200); but if an appeal is preferred and dismissed, limitation will run from the date of appellate judgment (*Baijnath v. Vallabhdas*, 1933 (Mad.) 511, 1933 M. W. N. 453, 65 M. L. J. 572, 144 I. C. 853).

Defence : To a suit on a foreign judgment, a defendant may plead any of the grounds mentioned in Sec. 13, C. P. C. or he may plead reversal of the judgment by court of appeal or satisfaction of the decree by the defendant. Judgment given after striking off the defence for default in answering interrogations and after the suit had thus become an undefended one is not judgment on merits within Sec. 13 (b) and no suit can be brought upon it (*Keymer v. Vishwanatham*, 15 A. L. J. 92, 40 M. 112, 32 M. L. J. 35, 19 Bom. L. R. 206, 21 C. W. N. 358, 25, C. L. J. 233, 10 Bur, L. T. 175, 38 I. C. 683). Similarly, when a judgment was given under special rules prevailing in Penang in an *ex parte* case without taking any evidence and on plaint allegations only, it was held that no suit could be brought in India on such judgment (*R. E. Mohomed Kasim v. Seeni pakir*, 100 I. C. 555, 52 M. L. J. 240, 1927 (Mad.) 265, 25 L. W. 307). Similarly, a decree passed against a minor without appointing a guardian *ad litem* for him or after appointing a guardian whose interest was adverse to a minor or after appointing the Nazir of the court as guardian when the minor lived in British India, (*Gajanan*

The plaintiff, therefore, claims Rs. 2,800, being the Indian equivalent of 200 as principal and Rs. 570 as interest, with further interest from date of suit to that of payment at 5 per cent per annum.

LANDLORD AND TENANT

No. 65—Suit for arrears of rent (u)

1. By a deed of lease, dated June 22, 1924, executed by the plaintiff and defendant, the plaintiff let the house bounded as follows and situate in the town of Delhi, Mohalla Maliwara, to the defendant for a period of two years and

v. Shantabai, 1939 (Bom.) 374, 185 I. C. 57) is opposed to natural justice and a suit cannot be brought upon it in the Indian Courts (*Hari Singh v. Mahammad Said*, 102 I. C. 523, 8 Lah. 54, 1927 (Lah.) 200; *Popat v. Damodar*, 36 Bom. L. R. 844, 1934 Bom. 390). A judgment by a biased court is also opposed to natural justice and is a nullity (*R. Vishwanathan v. Ruknulmulk Syed Abdul Wajid*, 1962 s. c. 1). But a judgment cannot be said not to be on merits merely because it is passed *ex parte*, if it was based upon a consideration of the truth or otherwise of the plaintiff's claim (*Wazir v. Munshi*, 190 I. C. 545 Pat.).

The fact that an appeal is pending from the foreign judgment is, however, no defence, though the Court might, for the sake of justice, stay proceedings of the suit on being informed of the pendency of the appeal (*Hari Singh v. Mohammad Said*, *supra*).

The defendant may plead that he was not the subject of the foreign state nor did he reside within the state nor did he submit to its jurisdiction, as in such a case the judgment is not, according to international law, binding, but the burden of proving these facts is on the defendant (*Ishri Prasad v. Shri Ram*, 105 I. C. 186, 1927 (All.) 510, 25 A. L. J. 887). Submission to jurisdiction which makes a judgment binding should be before decision (*Narapa v. Govinraja*, 57 M. 824, 149 I. C. 1168, 1934 (Mad.) 434, 1934 M. W. N. 626). But he cannot plead that judgment was erroneous or obtained by fraud committed by witnesses; fraud committed by plaintiff alone can avail (*Popat v. Damodar*, 1934 (Bom.) 390, 36 Bom. L. R. 844). Where a decree is a nullity on the day it is passed on the ground that the defendants neither resided within the court's jurisdiction nor had submitted to it, it cannot be executed against the defendants outside the jurisdiction of the court passing it. Art. 261 (3) of the Constitution has no application to such a decree. *Malo Ji Rao v. Sankar Saran*, 1958 All. 775 affirmed by Supreme Court in 1962 S. C. 1737.

(u) In a suit for rent, the agreement for rent must be alleged, and also the amount of arrears. If the lease was for a fixed term and rent is claimed for that term it is not necessary to allege defendant's possession during the period in suit, as he is bound to pay rent for the stipu-

the defendant covenanted to pay Rs. 100 per month on account of rent.

Boundaries of the said house

* * * *

2. The defendant has been in possession under the said lease during the period August 1925 to November 1925, but has not paid the rent for the said period, [or (if the suit is for period covered by the lease), the rent for the period August, 1925 to November, 1925 is in arrears].

lated period of tenancy, but if the lease is not for a fixed term, the plaintiff must allege that defendant was in possession during the period in suit. It is not necessary to plead the plaintiff's title to the property in a suit on the basis of tenancy as the defendant cannot deny it (*Kumar Raj Krishna v. Barabhani Coal*, 62 Cal. 346, 1935 (Cal.) 368), but if the plaintiff claims as successor of the person who had put the defendant in possession, the defendant can deny his title as such successor, and therefore he should plead it (*Dalat Ram v. Haveli Shab*, a182 I. C. 533, 1939 (Lah.)49.) whole amount in arrears at the date of suit must be claimed otherwise, O. 2, R. 2 will bar a subsequent suit. One of several joint owners is not entitled to bring a suit for his share of rent. He may sue for whole rent, (*Radhabinode v. Naba Kishore*, 94 I. C. 244, 30 C. W. N. 415, 1926 (Cal.) 568; *Manbodh v. Jaswant*, 20 P. L. T. 282), and in such cases it is better to implead the others as *Pro forma* defendants. If the lease is legally inadmissible in evidence for want of registration or other formal defect it is better to claim the rent in the alternative as damages for use and occupation (See Precedents under that heading). The suit must be for the whole rent of the whole holding, a suit for rent of part of the holding does not lie (*Ram Chandra v. Ram Ghulam*, 1938 (Pat.) 305, 177 I. C. 529).

It must be taken as well established that a joint owner or a co-sharer is not entitled as such to sue for proportionate rent, but it has been held that though this is undoubtedly the established rule, nevertheless, if the parties, namely, the land holders and the tenants agree to accept and pay proportionate rent according to shares, there is nothing illegal in such an arrangement. There can be an exception to the general rule where there is an agreement between the parties and presumably this agreement can be proved in one or the other ways known to law (*Venkatakrishna Reddi v. Govindraja Mudaliar*, (1953) I M. L. J. 814). The landlord's right to recover and the tenant's liability to surrender the property leased, on the determination of the lease, are inherent in the very relationship of landlord and tenant and are implied by law. (1952 T. C. 309). Where though the rent fixed is for a year it was to be paid from month to month as it became due it cannot be said that the rent note was executed for a period and when there is also a provision that the tenant would vacate the premises at any time whenever called upon by the landlord to do so, it shows that the tenancy created was tenancy at will. In such a case the tenant would not be entitled to statutory notice. (*Vallarji Bhauji v.*

The plaintiff claims—

- (1) Rs. 400 on account of rent.
- (2) Rs. 20 on account of interest at the usual rate of 1 per cent per mensem under the Interest Act, 1839.
- (3) Interest from date of suit to date of payment.

No. 66—Suit for ejectment on determination of tenancy by notice, with claim for mesne profits (v)

1. Under a verbal contract of March 25, 1922, the defendant held for the purpose of residence, the house

Jivan Dass Maurarji, 1952 Kutch 13). A tenancy for a fixed period determines only by efflux of time, the death of the tenant has, during the term, absolutely no effect and his legal representatives continue to be tenant for the remainder of the tenancy-at-will which is not heritable. A lease for an indefinite period is also said to be determined by the death of lessee. (*Raman Lal v. Bhagvan Dass*, 1950 Allahabad 583-1951 A. L. J. 179).

Where a landlord actively continues the prosecution of the case or appeal with regard to ejectment of the tenant, mere acceptance of rent by him cannot be treated as waiver so as to deprive him of the right of execution of ejectment decree. (*Khumani v. Saklay Lal*, 1951 A. L. J. 331).

Limitation : Three years from due date (Art. 52).

Defence : The defendant may deny the tenancy, but, if he admits it, he cannot deny plaintiff's title to the property or right to receive rent but may even in that case deny the particular contract of tenancy set up by the plaintiff, (*Mt. Nasiban v. Mohammad Sayed*, 164 I. C. 557; 1936 (Nag.) 174), or he may plead that the title of the plaintiff has passed to some one else after the commencement of tenancy (*Luckman v. Pearey Lal*, 1939 (All). 670). If the suit is by an heir of the lessor, defendant may deny the heirship or may plead that the interest of the lessor was not heritable. The defendant may plead that he has not been put in possession of the whole property leased or has been dispossessed from a portion of it, and therefore a proportionate reduction should be made from the rent. In England, the rule in such cases is that the whole rent is suspended, but it is inequitable to apply the rule to India (*Sisil v. Rajani*, 104 I. C. 775, 31 C. W. N. 990; *Maharaja Jagdish Nath v. Surendra Prasad*, 40 C. W. N. 166). The supreme Court has accepted this view and laid down that the doctrine of suspension of rent is not applicable in India and it will depend on the circumstances of each case whether the tenant is entitled to suspend the rent or remains liable to pay a proportionate part thereof (*Surendra Nath Bibra v. Stephen Court Ltd.* AIR 1966 S. C. 1361) This sets at rest the conflict of opinion and the view taken in *Bishambhar Nath v. Gudar Nath* 17 Pat. L. T. 365 *Hajara Bibi v. Abrar Husain* 1964 Alld. 343 is no longer good law.

(v) In every suit for the ejectment of a tenant, it is necessary to allege specifically the ground on which the ejectment is sought.

described below, as plaintiff's tenant from month to month, at a monthly rent of Rs. 30. His tenancy commenced on March 25, 1922.

Description of the house

* * * *

2. The Plaintiff duly determined the said tenancy by serving on the defendant, by registered post, on September 27, 1924, a notice to quit the said house at the close of October 24, 1924, yet the defendant has not vacated the house.

(*Dariyai Singh v. Chob Singh*, A. I. R. 1926 (All.) 248, 91 I. C. 863). A tenancy, which is neither permanent nor for a fixed term, can be determined by a notice to quit. The notice should be in writing, signed by, or on behalf of, the person giving it, and, if there are several lessors, all must join in the notice. In several states local Control of Rent and Eviction Acts have been passed, which restrict the right of ejection. Where such an Act exists, facts should be stated in the plaint to show that according to it, the plaintiff has the right to sue for ejection. The notice should be served either personally on the tenant or on a member of his family or on a servant at the tenant's residence, or by post, or by affixing it to a conspicuous part of the property, if personal service is not practicable (Sec. 106, Transfer of Property Act). Tender of the notice is sufficient though the tenant may refuse to accept it. If a notice is sent by post, proof of posting and non-return will raise a presumption of its service (*Harihar v. Ram Shashi*, 46 C. 958 (p.c.). This presumption is not displaced if when a notice is sent by registered post an acknowledgment is received purporting to be signed by some one else on behalf of the addressee (*Bodardoja v. Ajijuddin*, 33 C. W. N. 559, 49 C. L. J. 555, 1929 (Cal.) 651. *Bachalal v. Lachman*, 176 I. C. 393, 1938 (All.) 388). If there are several tenants the notice should be addressed jointly to all, though service of such a notice on one is evidence of information to all, *Lila Dhar v. Ranji Das*, 1956 A. L. J. 650; *Shrinath v. Srasvati Devi*, 1964, All. 52. It should show a definite intention to terminate the tenancy. When a notice is stipulated in the lease or is required by a local usage, it should conform to the contract or usage. In case of tenancy from year to year, 6 months and in case of tenancy from month to month, 15 days' notice is required unless there is a contract or custom to the contrary. Lease for agricultural or manufacturing purposes is presumed to create a tenancy from year to year and leases for other purposes a tenancy from month to month. From the mere fact that an yearly, rent is reserved there is no presumption that the tenancy was from year to year (*Chimti v. Kirpa*, 1941 (Pat.) 488, 194 I. C. 300). The six months or 15 days' time given by it is the minimum and there is no objection to giving a longer notice but it should expire with the year or month of the tenancy *Bagchi v. Morgan*, 166 I. C. 897, 1937 (All.) 36; *Sheikh Nuroo v. Seth Meghraj*, 170 I. C. 790, 1937 (Nag.) 139). It should not require the tenant to vacate the premises before or after the last date of the tenancy. In U. P. 30 days' notice is necessary in a case of monthly tenancy but it

3. The defendant has not paid the rent from June 25, 1924, or any part thereof.

4. That the defendant has (here mention the facts, entitling the plaintiff to sue for ejectment under the local Control of Rent and Eviction Act, if any) and is thus liable for ejectment under Section—of the said Act.

need not expire with the month of tenancy (U. P. Act 24 of 1954). Where A agreed to let a godown to B for three years from 1st June but a lease was not actually executed and the tenant remained a month to month tenant, the tenancy terminated on the last date of the month and not on the 1st June as it would have terminated under S. 110 if the lease had been executed. Now S.106 and not 110 would apply (*Calcutta Landing and Shipping Co. v. Victor Oil Co.*, 1944 (Cal.) 84). Notice to Vacate "on or before" the end of tenancy, has been held to be good (*Ismail v. Bai Zaulaikhabai*, 1944 (Bom.) 181). Many suits are dismissed for some defect in the form of the notice. The law should, therefore, be clearly understood before drafting a notice, and before drafting a plaint, the pleader should satisfy himself of the correctness and sufficiency of the notice given. A mere demand for possession is not a notice to quit (*Narayana v. Kunbhan Mannudiar*, 1949 Mad. 127, 1942 M. L. J. 559, 1947 M. W. N. 775.).

The fact that the tenancy was a tenancy at will, the 'purpose for which it was created, and the exact notice given should be set out in the plaint.' The date of the expiry of the month or year of tenancy and the exact date on which the tenancy was determined by notice should also be stated. It is not necessary to allege the plaintiff's title, as the defendant cannot deny it, even after the expiry of the term of the lease so long as he does not hand over possession to the lessor (*Bilaskaur v. Deshraj*, 37 A. 557 (p. c.); *Kumar Raj Krishan v. Barabani Coal*, 62 Cal. 346, 1935 (Cal.) 368).

Court-fee : A suit for ejectment can be brought on a court-fee calculated on a year's rent. The same will be its valuation for the purpose of jurisdiction. (*Narayanswamy v. Vennavai*, 39 M. 873, 31 I. C. 104). In U. P. a lower court-fee is provided when the suit is between rival tenants or by a tenant against a trespasser.

Procedure : All the co-sharers, must join as plaintiffs in a suit for ejectment of a tenant (*Gholam v. Mt. Khairan*, 31 C. 786), but a tenant continuing in occupation after the expiry of the period of lease is a tenant on sufferance whose position is akin to that of a trespasser, hence he can be sued by one of the co-sharers (*Ahmad Sabib v. Magnesite Syndicate Ltd.*, 29 I. C. 60, 39 M. 501, 17 M. L. T. 387, 28 M. L. J. 598; *Maganlal v. Budhar*, 101 I. C. 35, 29 Bom. L. R. 230; *Yeswant v. Keshav*, 41 Bom. L. R. 1213, 1940 (Bom.) 13, 186 I. C. 92; *Vinode Sagor v. Vishnubai*, 1947 Lah. 388).

A claim for rent may be joined with a claim for ejectment, and in that case the rent agreed upon and the period for which it is in arrears

The plaintiff claims—

- (1) Possession of the said house.
- (2) Rs. 120 on account of rent from June 25 to October 24, 1924.
- (3) Rs. 200 on account of mesne profits at Rs. 50 per mensem being the letting value of the house, from October 25, 1924 to the date of suit, and further mesne profits up to the date of delivery of possession at the same rate.

should be given in the plaint. But as after the period fixed in the notice, the defendant's possession becomes wrongful, mesne profits and not rent should be claimed for the period, which may be more or even less than the rent (*Suresh Chandra v. Kanti*, 110 I. C. 715, A. I. R. 1928 (Cal.) 436, 47 C. L. J. 530; *Ubdur Rahman v. Darbari*, 1933 (Lah.) 509, 146 I. C. 845). Sometimes, in notices to quit, the lessor also warns the lessee that if he remains in possession after the expiry of notice damages will be charged at a particular rate. This is penal, and the court is not bound to award damages at that rate (*Ramaswamiengor v. Ramamurthi*, 8 Mys. L. J. 130). But the Allahabad High Court has held in one case that such enhanced rent can be recovered on the ground of contract implied by defendant's remaining in possession (*Madan Mohan v. Bobra Ramlal*, 1934 All. 115, 1934 A. L. J. 921). In another case the view taken was that the maximum that can be claimed as damages is the rent payable under Rent Control Act. (*Dwarika Pd. v. Central Talkies*, 1956 All. 187). But in *Chiranjilal v. Kanwar Pd.*, (1963 All.249), it was held that the amount to be awarded should be assessed according to the reasonable market value of the accommodation. The Nagpur High Court has held that enhanced rent may be allowed if it was not penal or improbable if the tenant refuses to quit; but if he requires a little time for winding up his business he can occupy for such time on the original rent (*Parakh v. Anant*, 1940 (Nag.) 140, 189 I. C. 895). If a security is given and it is provided in the lease that the security money should be forfeited if lessee did not vacate on the expiry of the lease, the amount cannot be regarded as a stipulated penalty, but credit must be given for it in the damages claimed for non-fulfilment of the agreement (*Raman v. Nagu*, 10 R. R. 344, 173 I. C. 406, 1937 (Rang.) 57).

Limitation : Twelve years from the determination of the tenancy (Art. 67 of the Act of 1963).

Defence : Any flaw in the notice is a complete defence to such a suit. A waiver of the notice, either express or implied, may also be pleaded. It had been held in Sindh that a tenant who denies tenancy and pleads adverse possession is not entitled to plead want of notice, (*Mulibai v. Vassibai*, 104 I. C. 412), though it does not appear why such an alternative plea should not be allowed. If the defendant pleads that the land belongs to a third person, the latter need not be impleaded (*Subramanya v. Ananth*, 139 I. C. 679, 1932 (Mad.) 688).

No. 67—Suit for ejectment on expiry of term (w)

1. The plaintiff let the house described below to the defendant, by a deed of lease, dated February 1, 1917, for a term of eight years.

Description of the house

* * * *

2. The said term expired on January 31, 1925, but the defendant has not delivered possession and is still in possession.

3. That the defendant has (here mention the facts entitling the plaintiff to sue for ejectment under the local Control of Rent and Eviction Act, if any) and is thus liable for ejectment under Section—of the said Act.

(w) No notice is required in this case. But if the lease by which term was fixed is not a valid lease, e. g., if it is not registered, though it is required by law to be registered, or there is no lease but a mere *Kabuliyat* or *Kirayanama*, which cannot amount to a lease as it is not a bilateral document, as required by S. 107 of the Transfer of Property Act, no tenancy for the fixed period could legally be created, but the tenancy may be treated as one from month to month or from year to year as the case may be, and a notice will be required to determine it. If there is holding over, i.e., if, after expiry of the term, the tenant is still treated by the landlord as his tenant, a tenancy is created and is determinable by notice (Sec. 116, Transfer of Property Act). **Rent for the period after the expiry of the term should be claimed not as rent but as mesne profits.** If the tenant is not treated as tenant after expiry of the term of lease, but he remains in possession, his possession is that of tenant by sufferance, which is akin to that of trespasser (*Jagarnath v. Janki*, 66 I. C. 337, Pat. 340 A. I. R. 1922(P. C.) 142, 49 I. A. 81, 43 M. L. J. 55, 26 C. W. N. 833), and in such cases even one of the several landlords can sue for ejectment (*Yeshwant v. Kesav*, 41 B. L. R. 1213, 1940(Bom.) 13, 1861. C. 92). In such a case if suit is not brought within 12 years, the landlord's right to eject was held to be barred by Art. 139 (*Laitqut Ali v. Muhammad Baksh*, 102 I. C. 231 All.). Now that Article has been substituted in the Act of 1963 by Art. 67.

Defence : The defendant may plead that the lease was invalid, or that he was re-admitted to the tenancy by express contract, or by conduct, such as acceptance of rent by the plaintiff for a period after the expiry of the term. Acceptance of rent after the expiry of term, for a prior period, does not amount to renewal of the tenancy. He cannot plead that he is entitled to a renewal of the lease under the terms of his lease, for he can enforce such terms only by a separate suit for specific performance (*Sewakram v. Municipal Board, Meerut*, 169 I. C. 145, 1937 (All.) 328). He cannot plead title of third person (*Pusram v. Deorao*, 1947 Nag. 188).

The plaintiff claims—

(1) Possession of the said house.

(2) Rs. 200 on account of mesne profits at Rs. 40 per mensem being the letting value of the house, from February 1, 1925 upto date of suit, with future mesne profits upto the delivery of possession at the same rate.

No. 68—Suit for ejectment on ground of forfeiture (x)
(By breach of a covenant)

1. By a deed of lease, dated September 9, 1922, the plaintiff let his house situate in Rani Bazar in the town of Saharanpur and bounded as follows to the defendant, (or defendant No. 1) for three years at a monthly rent of Rs. 30.

(x) A forfeiture of lease occurs : (1) when the lessee breaks an express covenant of the lease, on breach of which the lease becomes void, or a right of re-entry is reserved to the lessor, or (2) when the lessee denies the lessor's title by setting up title in himself or in a third person, but a lease for a fixed term cannot be forfeited on this ground (*Maharaja of Jeypore v. Rukemini*, 42 M. 589, 17 A. L. J. 552 (P. C.)).

But, in either case, the lease is not determined unless the lessor or his transferee gives notice in writing to the lessee of his intention to determine it. The notice need not be in any specified form and need not give any specified time (Sec. 111 (g), Transfer of Property Act).

The specific condition of the lease and its breach, or a definite and unequivocal denial of title, must be alleged in the plaint. The giving of notice under Sec. 111 (g) should also be alleged as notice is not a condition precedent which need not be pleaded (*vide Chap. III* under "Condition Precedent.") When a lease is not alleged in the plaint and the allegations do not amount to more than this that the defendant was a licensee who paid rent, Sec. 111 (g) cannot be applicable (*Kanhaya Lal v. Abdullah*, 160 I. C. 866, 1936 (All.) 385). The denial of title must be express, and not merely casual, must have been made to the knowledge of the plaintiff (*Komalukutti v. Pulikalakath*, 41 M. 629), must have been specific and unequivocal (*Sardar Singh v. Man Singh*, 100 I. C. 646 All.), and must have been made before the suit and not in the pleading in the suit itself (*Mir Haider v. Jakiram*, 122 I. C. 271; *Balkaran v. Gangadin*, 36 A. 370; *Quadir v. Prag*, 35 A. 145, 9 A. L. J. 794; *Naurang v. Janardan*, 45 C. 469; *Indar v. Achbru* 110 I. C. 45 Lah; *Darbar v. Baralal*, 162 I. C. 797, 1936 (Pat.) 275). It must be noted that the landlord should in such cases take legal proceedings to determine the tenancy, and breach of condition cannot *ipso facto* amount to a cancellation of the lease. The landlord cannot, therefore, give a new lease to another person entitling the latter to sue the old tenant as a trespasser (*Ambika v. Beni Madho*, 118 I. C. 841, A. I. R. 1929 (Oudh) 529).

Forfeiture can be made of the entire tenancy and not of part only

Boundaries of the house

* * * *

2. By the said deed, the defendant agreed to pay rent regularly every month, and further agreed that in case of default in payment of rent for any two months the plaintiff should be entitled to resume possession, (or, the said defendant No. 1 agreed not to sublet the house to any other person and, further, that if he did so, the plaintiff should be entitled to terminate the lease).

3. The defendant took possession under the said lease, and is still in possession thereof. He paid rent to the plaintiff upto September, 9, 1924, but has not paid the rent which accrued due on October 9, November 9, and December 9, 1924, (or, by a verbal agreement on September 15, 1924, the defendant No. 1 sublet the said house to defendant No. 2 and has put the said defendant No. 2 in possession).

4. On December 17, 1924, the plaintiff sent by registered post a notice to the defendant (or defendant No. 1) putting an end to the tenancy on the ground of the aforesaid breach of covenant in the lease and the said notice was delivered to the defendant (or the defendant No. 1) on December 18, 1924.

(*Soorayya v. Sooranna*, 1936 (Mad.) 252). But in a case of forfeiture for unauthorized assignment, where the lease was in favour of several persons and their shares were separately specified it was held that forfeiture of the whole tenancy of all the tenants should not be made but only in respect of the share of the tenant in fault (*Pancham Singh v. Promotha Nath*, 164 I. C. 358, 1936 (Pat.) 450).

Defence : The defendant may plead that the denial of title was not clear and that he never meant to deny the title of the plaintiff, that the plaintiff did not give the required notice, or that the plaintiff has done an act (e. g., acceptance of rent or levying a distress) which amounts to a waiver of the forfeiture (Sec. 112). Or, where the condition broken is that of payment of rent, the defendant may admit the claim and pray for relief against forfeiture under Sec. 114 by paying the rent with interest and full cost, or by giving security to pay the same within 15 days. The defendant may show that the title of the plaintiff had determined after the lease and before he denied it (*Vendu v. Nilkanth*, 22B, 228). Where the condition broken was against alienation, defendant cannot plead that the implication was that the consent to alienation would not be unreasonably withheld when he never asked for the landlord's con-

The plaintiff claims—

- (1) possession of the said house.
- (2) Rs. , on account of arrears upto December 17, 1924.
- (3) Rs. , on account of mesne profits from December 18, 1924 upto the date of suit, with future mesne profits upto the date of delivery of possiesson.

No. 69—Ditto, (By denial of title)

1. The plaintiff let the house described below to the defendant, by a verbal agreement, on December 14, 1924, and the defendant entered into possession on that date and has been in possession ever since.

Description of the house

* * * *

2. In a written statement which the defendant filed in this court on April 14, 1925, in suit No. 22 of 1925, which the plaintiff had brought for arrears of rent against him, the defendant stated that he was the owner of the house and that the plaintiff had no title to it.

3. On July 8, 1925, the plaintiff sent a notice to the defendant by registered post putting an end to the defendant's lease by reason of the defendant's aforesaid denial of the plaintiff's title. The said notice was delivered to the defendant on July 10, 1925.

The plaintiff claims (same as in No. 68.)

sent at all (*Thakur Dayal v. Rai Promotha Nath*, 164 I. C. 811 (2), 1936 (Pat.) 493. He may plead waiver of the forfeiture by any subsequent act or conduct of the landlord, but waiver of one breach will not bar the right of forfeiture on the occurrence of a subsequent breach (*Muhamad Hassan v. Baidya Nath*, 184 I. C. 605, 12 R. P. 253, 1940 (Pat.) 140). Acceptance of rent falling due after breach amounts to waiver but not the acceptance after institution of suit (*Motilal v. Pure Jambar Colliery*, 44 C. W. N. 1109; *Chotu Mian v. Mt. Sunderi*, 1945 (Pat.) 260)), but to establish waiver by acceptance of rent tenant must show landlord's knowledge of his right to enforce forfeiture and acceptance of rent with conscious abandonment of that right (*Fatehlal v. Dayal*, 1949 Nag. 218).

In all suits for ejection from a house or other accommodation to which any Control of Rent and Eviction Act is applicable the tenant may also rely on the protection against eviction afforded by the relevant

No. 70—Suit by Gaon Sabha for recovery of possession of house on abadi site after abandonment or escheat (y)

1. That the house described in the amended schedule stands on a site in the abadi of village Arjunpur, Gaon Sabha cricle Arjunpur, Tehsil and Dist. Meerut.

2. That on the coming into force of the U. P. Zamindari Abolition and Land Reforms Act, 1 of 1951, the building and the site of the house above mentioned stood settled with Sri Rameshwar Singh, who was in possession thereof on the date of enforcement, i. e., 1st July, 1952.

3. That the said Rameshwar Singh left the village and abandoned the house and site above mentioned on the 8th September, 1962, and has not come back thereafter (or that Rameshwar Singh died on 8th September, 1962, without leaving any heirs entitled to succeed him and the site and house escheated to the State).

4. That the rights of the State in the said abadi site and house vest in the plaintiff under notification no. H-560/2 dated 15 th July 1952.

5. That after the abandonment (or death) Rameshwar Singh, the defendant has entered into possession of the house and site on 15th Dec. 1962, without any right.

6. That the plaintiff claims possession of the said site and house.

No. 71—Suit for damages for wrongful disturbance by the landlord or by his subsequent lessee (z)

1. By a deed of lease dated November 24, 1924, the defendant (or defendant No. 1) let to the plaintiff an open space of land lying to the west of the Municipal Hall in the

Act denying the facts on the basis of which the landlord seeks to deprive him of the protection.

(y) With the coming into force of U. P. Act No. 1 of 1951, namely, U. P. Zamindari Abolition and Land Reforms Act of July 1, 1952 all the interests of the intermediaries, namely the zamindars have vested in the State of Uttar Pradesh. This includes wells, trees in *abadi* and buildings. Section 9 of the said Act provides that all buildings shall be

town of Budaun, for the purpose of erecting a theatrical stage for a period of four months, at a monthly rent of Rs. 100.

2. The plaintiff took possession of the said land on November 24, 1924, under the said lease, and was in possession up to November 30, 1924.

3. On November 30, 1924, the defendant took wrongful possession of the said land, and broke and removed the bamboos which the plaintiff had erected thereon for the purpose of making a stage pandal (or, on November 29, 1924, the defendant No. 1 let the said land to the defendant No. 2 who took the lease with notice of the plaintiff's lease. The said defendant No. 2, on November 30, 1924, took wrongful possession of the said land and broke, etc.)

4. In consequence of the aforesaid acts, the plaintiff had to take other land from Ram Chandra on a rent of Rs. 300 a month and has suffered damage.

Particulars :

Cost of bamboos	Rs. 100
-------------------------	---------

Difference between the rent agreed to be paid to the defendant (or, defendant No. 1) and the rent agreed to be paid to Ram Chandra for the other land, for three months and 24 days (the unexpired portion of the plaintiff's lease), at Rs. 200 per month Rs. 760.

The plaintiff claims Rs. 860, with interest from the date of suit to that of payment.

deemed to be settled with the person in the possession thereof by the State Government on such terms and conditions as may be prescribed. Rule 26 of the rules framed under the said Act provides that the building in *abadi* along with the area appurtenant thereto shall be deemed to be settled with the owner of the building on the following terms and conditions. (1) He shall have heritable and transferable interest in the site (2) he shall not be liable to ejection on any ground whatsoever (3) he shall have the right to use the site for any purpose whatsoever subject to the existing right of easement (4) succession will be governed by personal law (5) if the building is abandoned or if the owner dies without any heir entitled to succeed the site shall escheat to the State and (6) he shall pay to the Gaon Samaj rent for the site equal to the amount of rent payable therefor on the date immediately preceding the date of vesting,

**No. 72—Suit by Tenant against Landlord,
with Special Damage**

(*Form No. 19, Appendix A, C. P. C.*)

1. On the day of 19, the defendant, by a registered instrument, let to the plaintiff the house No. , Street for the term of years, contracting with the plaintiff that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2.* All conditions were fulfilled (and all things happened necessary to entitle the plaintiff to maintain his suit).

3. On the day of , during the said term, *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G. H.* and *I. F.* by such removal].

[*This allegation is against O. 6, R. 6, C. P. C.]

if any such rent was payable then. The rule further provides that a buliding in a holding or a grove shall be deemed to be settled with the tenure holder on the same tenure as the holding or the grove in which it is situate. Under Section 117 of the said Act all *abadi* sites shall vest in the Gaon Sabha established for the circle. In view of these provisions of law a ryot cannot be ejected now from the *abadi* site on any grounds whatsoever except where he abandons it or dies without any heir. The occupier has been given a transferable and heritable interest in the site. The customary law prevailing heretofore has thus become redundant and the landlord has not been left with any right in the *abadi* sites. Hence this precedent has been substituted for that of a suit for possession against a Ryot on the ground of unauthorized trnasfer in earlier editions of this book.

LICENCE (aa)

No. 73—Suit for ejecting a licensee and for injunction

1. By a verbal agreement, on January 4, 1925, the plaintiff granted a licence to the defendant to occupy the house described below, and to take water from the well situate to the west of the said house, for period of one month.

(aa) A licence is permission to do any act on the immovable property, of the licensor, when such permission does not amount to the creation of an easement or transfer of an interest in the property. For distinction between a lease and a licence see *Lal v. Dunlop Rubber Co.* 1968 A. I. R. Sec. 175.

A licence is revocable at the pleasure of the licensor, except in cases mentioned in Sec. 60, Easements Act. It is also impliedly revoked in cases mentioned in Sec. 62. No notice is necessary to revoke a licence (*Gobinda v. Nandulal*, 45 I. C. 317, 27 C. L. J. 523), and therefore a suit for the ejectment of a licensee or for an injunction restraining the defendant from doing the acts for which licence was granted may be instituted without a previous notice. But a plaintiff may be deprived of his cost, if the licensee's plea be that he was prepared to leave the land or to desist from continuing to do the act and would have done so had the licensor expressed a desire to revoke the licence. If, however, the licence is revoked by expiry of the period for which it was granted, or on any of the other grounds mentioned in Sec. 62, Clauses (c), (f), (g), or (i), the licensee is not entitled to any notice and cannot even be exempted from costs of the licensor's suit. It has been held by the Privy Council in *Canadian Pacific Railway v. The King*, 61 M. L. J. 958, that where the exercise of the right has involved the licensee in obligations which the immediate determination of the lease would disable him from fulfilling the licence can only be determined after sufficient notice for the making of substituted arrangements. A licence is personal and in the absence of a different intention appearing it cannot be exercised by agents, servants, transferees or even heirs. On the death of the licensee the position of an heir is that of a trespasser or tenant at will (*Chinnan v. Ranjithammal*, 59 M. 554, 131 I. C. 175, 1931 Mad. 216, 60 M. L. J. 709.)

A licence is revocable unless (1) it is coupled with a grant or interest or (2) the licensee acting on the licence has constructed work of permanent nature.

Where licence is revocable, the licensee is entitled to reasonable notice. If, however, the licence is revoked, the remedy is by way of damages and not by way of injunction. If the licence is irrevocable and its enjoyment is obstructed by the licensor, there is authority that the remedy of the licensee is either by way of injunction or damages. The Calcutta High Court seem, however, to hold that even in such cases the remedy will be one by way of damages. (*Mobd. Ziaul Hasan v. Standard Vacuum Oil Co.*, 55 Cal. 232).

2. The defendant entered into possession of the said house under the said licence, on January 4, 1925, and has, since that date, been taking water from the said well.

3. The term of the licence expired on February 4, 1925, but the defendant is still in possession of the house and is still taking water from the well.

The plaintiff claims—

(1) Possession of the said house.

(2) A perpetual injunction restraining the defendant from taking water from the said well.

MARRIAGE (bb)

No. 74—Suit for damages for breach of a contract to marry

1. On July 10, 1924, the defendant verbally agreed to marry his minor daughter, Mt. Raj Kali, to the plaintiff, and the marriage was fixed for the 24 June, 1925.

Defence : If the defendant admits the licence he cannot deny the plaintiff's title to the land, though he can plead that it has been extinguished after the grant of licence. He may plead that he has, acting upon the licence, executed a work of permanent character on the land under the licence and has incurred expenses in doing so, or that the licence was coupled with a transfer of property which is still in force (Sec. 60). A person makes constructions "acting upon the licence" when licence is granted for building purposes or where constructions are made for purposes necessary for the enjoyment of the licence. Where a person is permitted to visit a place to learn wrestling, he cannot put up a building at that place, *Govind v. Mst. Kishni*, 1956 A. L. J. 527. Even a *Kutcha* building, if regularly kept in repairs, may be a work of permanent character (*Nasirul-Zaman v. Azimulla*, 3 A. L. J. 765, 28 A 741, A. W. N. (1906) 216; *Thakur Prasad v. J. Thomkinson*, 102 I. C. 26 Oudh; *Tripathi v. Jokhu*, 113 I. C. 757 All.). The work must be done on the licensor's land which cannot be bound in perpetuity on account of any work done by the licensee on his own land, *Gujrat Ginning Co. v. Motilal*, 40 C. W. N. 417, 1936 A. L. J. 145, 160 I. C. 837, 1936 (P. C.) 77). He may claim exemption from costs as stated above. He may claim a reasonable time to leave the property or to remove his goods from it (Sec. 63).

(bb) Suit for breach of contract to marry are rare in India. The ceremony known as betrothal is not always identical with a contract to marry, though it is evidence of a previous contract. Such contract usually precedes the ceremony of betrothal and gives a good cause of action, even if no such ceremony is held. A contract to marry cannot

2. The plaintiff was always ready and willing to marry the said Mt. Raj Kali, and had made all necessary preparation for the marriage, but the defendant has refused to marry her to the plaintiff, and has, on June 20, 1925, married her to one Ram Kishore.

3. The plaintiff has suffered special damage, particulars of which are given below :

1. Presents made on the occasion of *Tij* festival Rs. 156

Details of the above

	Rs.
A Benarsi Sari	80
An embroidered bodice	40
A Silk rope	5
Wooden <i>patris</i>	4
Sweets	10
Fruits	10
Cash	7

2. Presents made on the occasion of *Devalli* festival Rs. 177

Details

	Rs.
Seven Silver Toys	30

be specifically enforced, but a suit for damages for its breach lies (*Parshotamdas v. Parshotamdas*, 21 B. 23; *Abdul Razag v. Md. Husein*, 42 B. 499). As such contracts are usually made in India by guardians, a suit will lie against the guardian. A minor being incompetent to enter into contract cannot sue for damages for breach (*Ma Pwa Kywe v. Mannng Hyat*, 1938 (Rang.) 667), but a minor girl can sue for damages for breach of contract made by her father on her behalf (*Fernandez v. Gonsalves*, 48 B. 673; *Md. Omar v. Budha*, 3 P. R. 1909). A suit lies against the girl where she becomes major for breach of contract entered into by her father during her minority (*Ghulam Muhammad v. Meharaj Din*, 75 I. C. 746, 1923 (Lah.) 679). **The making of the contract, its breach by the defendant, and the damages claimed, should be alleged in the plaint.** The damages actually arising to the plaintiff, for instance the value of the customary presents, or what the plaintiff has to spend in making preparations for the marriage ceremony, may be all recovered in addition to the general damages. General damages may also be claimed even if no special damages have been suffered (*Fernandez v. Gonsalves*, *Supra*), but it has been held in *Abdul Razag v. Md. Husein*, 42 B. 499; and *Ghulam Muhammad v. Meharaj Din*, *Supra*, that general damages cannot be allowed. Money paid as consideration of the marriage cannot be recovered according to the Allahabad High Court (*Girdhari v. Neeladhar*, 10 A. L. J. 159, 16 I. C. 1004), but the Punjab Courts

Twenty-five Earthern toys	..	..	..	20
Sweets (30 seers)	..	..	..	30
Fruits	..	..	..	10
Cash	..	..	..	7
A silk Sari	..	..	..	60
A silk bodice	..	..	..	20
3. Expenses incurred by the plaintiff by reason of breach of contract by defendant	..	..	Rs.	1,000
			Rs.	
Paid as damages to Bundu for paper flowers	..			100
Paid as damages to Kallan for fire-works	..			200
Paid as damages to band party of Kale Khan	..			200
Paid as damages to singing party of Karim Beg	..			200
Paid as damages to singing party of Nabban	..			300

The plaintiff claims—

- (1) Rs. 1,000 as general damages for mental suffering and public disgrace and humiliation.
- (2) Rs. 1,333 as special damages.
- (3) Interest from date of suit to that of payment.

have held that it can be recovered as the agreement, though void, has not been performed (*Jivana v. Malak Chand*, 53 I. C. 407, 114 P. R. 1919; *Firm Prabhu Mal v. Baburam*, 1926 (Lah.) 159; *Bhan Singh v. Kaka*, 1933 (Lah 849)).

Money agreed to be paid as consideration of marriage cannot be recovered after the performance of the marriage on the ground that such contracts are void. The Bombay and Madras High Courts and the Punjab Chief Court have held that all such contracts are void, but the Allahabad High Court is of opinion that each case should be decided on its own facts, and such a contract is not necessarily void,—it is void when sale of the girl was apparently intended and where the marriage arranged was unsuitable and the main object of the guardian was merely to obtain money (*Dholidas v. Ful Chand*, 22 B. 658; *Venkata v. Lakshmi*, 32 M. 185; *Baldeo v. Jakina*, 23 A. 495; *Jagdishwar v. Sheo Baksh*, 51 I. C. 856).

Defence : The defendant may plead that plaintiff himself refused to marry, or that the contract had been rescinded by mutual consent, or that the promise was conditional and the conditions were not fulfilled by the plaintiff, or if the plaintiff is the woman, that the defendant has discovered, since the contract, that she was not chaste or if the plaintiff is the man, that the defendant has since discovered that the plaintiff is impotent. If the suit is against a guardian, unwillingness of the girl is no defence under the Hindu Law (21 B. 23, *Supra*), but Mohammedan girl's refusal on attaining majority absolves the guardian (*Imam Din v. Kamal*, 29 I. C. 750).

MASTER AND SERVANT (cc)**No. 75—Suit by servant for his wages**

1. The plaintiff was employed by the defendant as his Head Clerk and Accountant, under a verbal agreement, on August 1, 1924, at a monthly salary of Rs. 200.

2. During the period of the plaintiff's employment, the defendant several times falsely accused the plaintiff, in the office and in the presence of the assistant clerks and menial servants, of dishonesty, and, by his general humiliating treatment, made the plaintiff's position intolerable. On June 20, 1925, the defendant sent a report to the police falsely accusing the plaintiff of dishonestly appropriating defendant's money. The charge was, on investigation, found by the police to be false.

The plaintiff claims Rs. 180 for his pay from June 1 to 27, 1925, with interest from date of suit to that of payment.

(cc) The relation between a master and a servant is regulated by the contract of service. The contract may provide any lawful terms. It is not illegal to provide that a servant would not leave the service without giving 15 days' notice (*Aryoday v. Siva Virchand*, 13 Bom. L. R. 19, 9 I. C. 348). If a man enters into any service, a contract to be bound by all the published rules of that service will be implied. In the absence of any contract to the contrary contract of service is determinable by reasonable notice on either side. Generally a month's notice is considered sufficient (*Ralli Brothers v. Amulka Prasad*, 11 A. L. J. 104, 18 I. C. 699, 35 A. 132), but it really depends on the circumstances of each case and the nature of the service, e.g., a Municipal Secretary and a school Master have been held entitled to three months' notice (*Municipality of Tatta v. Assamal*, 29 I. C. 597 Sind; *Nirad Chandra v. Raja Kirtya Nanda*, 1922 (Pat.) 24). In a case a tutor was held entitled to six months' notice (*Wittenbaker v. J. C. Galstaun*, 36 C. L. J. 256, 44 C. 917, 43 I. C. 11), but a months notice was considered reasonable in Burma in the case of a teacher employed by month (*Maung Thein v. J. P. De Souza*, 7R. 303, 119 I. C. 740, 1929 (Rang.) 167). If a servant is hired by month fifteen days' notice is reasonable (*Ralaram v. Brij Nath*, 168 I. C. 697m 39 P. L. R. 501). If a servant leaves without notice, he is not entitled to pay for the broken period of the month in which he leaves and will be further liable for damages, but he must get his wages upto the end of the month preceding that in which he leaves (*Amar Singh v. Gopal*, 1931 (Lah.) 133, 132 I. C. 577). He is, however, justified in leaving the service if the master is guilty of any breach of contract, or of any act or neglect on his part which is prejudicial to the safety, health, moral or reputation

No. 76—Suit for damages for wrongful dismissal

1. Under an agreement in writing, dated June 20, 1924, the plaintiff was employed by the defendant to serve him as his assistant, from July 1, 1924 at a monthly salary of Rs. 150.

2. By the terms of the said agreement it was agreed that the plaintiff should be retained by the defendant in his service until the service should be determined by a three months' notice given by the defendant to the plaintiff.

of the servant (*Middleton v. Playfair*, 1925 (Cal.) 88). According to English authorities, a servant, who leaves before the expiry of the fixed term of service, cannot get pay even for the period he has served. This strict rule has been followed in Bombay and Calcutta (*Aryodaya v. Siva Virchand*, 13 Bom. L. R. 19, 9 I. C. 348; *Dhume v. Sevenoaks*, 10 C. 80), but the Madras High Court has taken a lenient, and apparently more equitable view in holding that a servant leaving without excuse can recover his pay for the period he has served, less the master's damages for the breach of contract (*Choklingam v. Mahomed Shariff*, 23 M. L. J. 680, 17 I. C. 894). If the servant gives one month's notice of his intention to leave service and the master accepts his resignation immediately and appoints another servant, the servant is entitled to pay for the period of notice also (*General Assurance Co. v. Tirupati*, 1 Mysore L. J. 201.)

If a master dismisses a servant during the fixed term of service, or, when no term is fixed without a reasonable notice, he is liable for damages for wrongful dismissal. The measure of damages in such cases may be the pay for the unexpired period or for the period of a reasonable notice, or when a notice is provided in the agreement the pay for the period of that notice (*Secretary of State v. Burrowes*, 1937 Lah. 549; *Gokak Municipality v. Raja, Ram*, 1940 (Bom.) 386). *Tanjoir Bank v. G. N. Munia Swami* A. I. R. 1964 Mad. 183, But the plaintiff must show that he was ready and able to render service during this period. Where a servant absented himself without leave and got an operation performed which incapacitated him for work for a period of over a month, and was dismissed, held that he could not claim damages for dismissal without notice (*Burma Oil Co. v. Narain Das*, 104 I. C. 185 Sind). When a servant is paid monthly and is dismissed during the currency of a month, he may claim, as pay what is due to him for any completed month before his dismissal, (*Tribeni Misser v. Jagannath Bhagwan Das*, 1937 (Rang.) 444, 1938 (Rang.) 86, 175 I. C. 105), but the pay of the broken period upto the date of his dismissal can be claimed only as part of the damages. A master can dismiss a servant without notice and even during the fixed period on the ground of misconduct, neglect of duty or incompetence (*Pandurang v. Jairamdas*, 1925 (Nag.) 166; *Ramsawami v. Madras Times P. and P. Co.*, 37 I. C. 655 Mad; *Piara Lal v. Sri Ram*, 165 I. C. 210 (1), 1936 (Lah.) 581). If a dismissal is justified, pay of the broken period cannot be recovered (*Bhakta v. Seetal*, 1925 (All.) 680, 23 A. L. J. 282).

3. By a letter of June 10, 1925, the defendant, without giving the plaintiff any such notice as aforesaid, wrongfully dismissed the plaintiff from service.

4. At the time of such dismissal, there was due, from the defendant to the plaintiff, pay for the months of April and May, 1925.

The plaintiff claims—

- (1) Rs. 300, arrears of his pay.
- (2) Rs. 500, on account of damages.

When an apprentice is a minor living with his father and maintained by him, the father can bring a suit for his wages (*Muthuvelu v. Govindaswami*, 117 I. C. 304, 1929 (Mad.) 781).

In a suit for damages for wrongful dismissal, facts showing that the plaintiff was entitled to remain in service, and that his dismissal was wrongful, must be alleged. In a suit for pay or wages, the contract should be alleged, and also how it terminated. If it is terminated by the plaintiff's own resignation, facts justifying the resignation must be alleged.

Except as expressly provided by the Constitution, every person who is a member of a defence service or of a civil service of the Union or of an All-India Service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a Civil Service of a State or holds any civil post under a State holds office during the pleasure of the Governor. (Art. 310 (1) of the Constitution.) The Privy Council had held that the State could not be sued for damages for wrongful dismissal nor for arrears of salary by the dismissed servant and the relief which could be granted to a servant illegally dismissed was a declaration that the order of dismissal was null and void and that he continued to be a member of the Service. The servants' remedy, according to the Privy Council, was by way of appeal under the departmental rules *High Commissioner of India v. I. M. Lall*, 1948 P. C. 121; *North West Frontier Province v. Suraj Narain*, 1949 P. C. 112; *Venkata Rao v. Secretary of State*, 1937 P. C. 31. Federal Court, however, held in *Punjab Province v. Tara Chand*, 1947 F. C. that a suit for arrears of salary by a servant illegally dismissed did lie against the Government. This view has been upheld by the Supreme Court also in *State of Bihar v. Abdul Majid*, 1954 S. C. 245; and *Om Prakash v. State of U. P.*, 1955 S. C. 600. Under Art. 141 of the Constitution law declared by the Supreme Court is binding on all courts in India. The argument which has found favour with the Supreme Court is that if a creditor of the Government servant can attach his salary in Government hand under Sec. 60 (1) (i) C. P. C. there is no reason why the servant himself should not be permitted to sue the Government for the salary.

Particulars of damages

	Rs.
Pay from June 1 to 10	50
Three months' pay in lieu of notice ..	450
Total	500

(3) Interest from the date of suit to that of payment.

No. 77—Like suit, another form

(Form No. 15, Appendix A, C. P. C.)

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, *or* in the capacity of foreman *or as the case may be*], and that the defendant should employ

Even apart from Government Employees the ordinary law of master and servant has in any many cases been modified by statutory provisions e.g. in case of employees of local bodies Educational Institutions, Industrial employees etc. In such cases dismissal must be in accordance with the statutory provisions otherwise a suit for declaration that the dismissal order is void or a claim for wages ignoring the dismissal will lie. In case of wrongful termination of contractual service, however, damages is the proper remedy and in the absence of special circumstances declaratory relief will not be granted *Phoolchand v. Chancellor Kurokshatria University* A. I. R. 1968 S. C., 292 *Hindustan Steel v. P. J. Verghese* 1967 I. L. R. 47 Pat. 13.

Limitation : for a suit for wages under the Employers and Workmen (Disputes) Act is only six months, and for wages of a house-hold servant and other artisan or labourer, it is one year (*Art. 7*). For all suits for wages or pay, the limitation is three years from the date it accrues due. A suit for wrongful dismissal is a suit for damages for breach of contract of service and was held to be governed by Art. 115 (*The Municipality of Tatta v. Assanmal*, 29 I. C. 597) now Art. 55.

Where a person was employed in a cloth business his claim to recover bonus due under agreement of service was held to be governed by Art. 102 of the Limitation Act and the suit was required to be filed within three years from the date when the amount accrues due as such bonus (1952) 2 M. L. J. 890). Now the Art. applicable will be Art. 113 of the Lim. Act, 1963.

Defence : In a suit by a servant for his wages, the defendant may plead that the plaintiff was dismissed for misconduct or incapacity or neglect of duties, or that he left of his own accord and without any justification, hence he is not entitled to pay for the broken part of the month. In a suit for damages for wrongful dismissal, the defendant may deny the dismissal and plead that the plaintiff voluntarily withdrew from

the plaintiff as such for the term of [one year] and pay him for his services.

2. On the day 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the day of 19 , the defendant wrongfully discharged the plaintiff and refused to permit him to serve as aforesaid, or to pay him for his service.

No. 78—Suit for breach of contract to serve

(Form No. 16, *Appendix A*, C. P. C.)

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

the service, or he may justify the dismissal by pleading misconduct, or incapacity or neglect of the plaintiff. But it is no defence to a suit for dismissal within a fixed term that the defendant's business was not improving or he could get another cheaper man (*Sundaram Chettiar v. Chocklingham Chettiar*, 1938 M. W. N. 653, 1938 (Mad.) 672, (1938) 1 M. L. J. 857, 47 L. W. 803). All that is necessary is that the existence of the reason for dismissal on the date of dismissal must be shown. It is immaterial that the defendant did not know of them and dismissed the plaintiff on other grounds (*Sassoon v. Dossa Kalian*, 15 I. C. 757, 5 S. L. R. 192). But where the dismissal is wrongful because the person dismissing the plaintiff was not competent to dismiss him, the fact that there were good reasons for dismissal can be no justification (*Venkata v. Ponnuswami*, 41 M. 357, 33 M. L. J. 660, 43 I. C. 205). Also, misconduct will be no justification where the master had knowledge of the facts constituting the justification, and had deliberately condoned them and waived his right of dismissing the servant on account of them (*Sassoon v. Dossa Kalian*, 15 I. C. 757, 5 S. L. R. 192).

Full particulars of the alleged misconduct or other facts showing justification must be given in the written statement. It is a sufficient defence if the facts justify the dismissal, and the question whether the Judge would have himself dismissed a servant on that ground is an irrelevant consideration (*The Madura, etc. v. Sundaram*, 1926 (Mad.) 57, 49 M. L. J. 526, 91 I. C. 525).

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do.]

3. The defendant entered upon the service of the plaintiff on the above-mentioned day, but afterwards, on the day of 19 , he refused to serve the plaintiff as aforesaid.

MONEY SUITS (dd)

No. 79—Suits for money lent

1. On June 4, 1923, the defendant borrowed Rs. 400 from the plaintiff and agreed to repay the loan on demand (or, within six months), with interest at 12 per cent per annum; [or from May 20, 1922 to June 4, 1923 the defendant borrowed money from the plaintiff on several occasions and agreed to repay it on demand, with interest at 12 per cent per annum.]

Disobedience of an order which is not lawful is not misconduct e.g., refusal of a servant to go to a place where he is in danger of life (*The Ottoman Bank v. Chakrian*, 124 I. C. 881, 1930 (P. C.) 110).

If pay for the unexpired period of service is claimed as damages the defendant may plead that the plaintiff had opportunities to obtain other service during the period and he wrongfully refused to take other employment. If pay in lieu of notice is claimed defendant may show that plaintiff had actually obtained equally advantageous employment (*Baldeo Singh v. Sachdev*, 151 I. C. 613, 1934 (Rang.) 107).

(dd) A suit for a simple money debt, if advanced on the security of a bond or other agreement, must be brought on the basis of such bond or agreement. Otherwise, it is a simple suit for money lent and **the fact of the loan, with the terms on which it was advanced, must be alleged in the plaint.** If the suit is within three years of the loan, an express promise of repayment need not be pleaded, as the same is implied in the request for the loan (*Pramatha v. Dwarka*, 23 C. 821). If the plaintiff has kept a memorandum of the debt or has entered it in his account books, the fact need not be alleged in the plaint, as that is only an evidence of the loan. Even if there is an acknowledgment of the loan in the defendant's hand in the plaintiff's *Bahi khata*, it need not be alleged in the plaint, though it would be an excellent piece of evidence at the trial. It has already been shown that if the acknowledgment is accompanied by a promise it can be made the basis of a suit and should then be pleaded (*See "Account stated"*).

Particulars of the loans

				Rs.
May 21, 1922	..	..	..	50
August 4, 1922	..	..	..	50
October 8, 1922	..	..	..	50
November 10, 1922	..	..	..	10
January 12, 1923	..	..	..	100
March 14, 1923	..	..	..	40
April 15, 1923	..	..	..	100
Total				400

2. The defendant has not made any payment or, the defendant has not made any payments except the following :—

Particulars of payment

Date

Sum.

The plaintiff claims Rs. , with interest from date of suit to that of payment.

*Particulars of the amount claimed***No. 80—Like suit, another form***(Form No. 1, Appendix A, C. P. C.)*

1. On the day of 19 , he lent the defendant rupees repayable on the day of

2. The defendant has not paid the same, except rupees paid on the day of 19 .

[If the plaintiff claims exemption from any law of limitation, say :—]

Limitation : Three years from the date of loan under Arts. 19, 21. But if money is repayable at a specified time Art. 113 will apply and time will run from the date fixed for payment. If money is lent by cheque, under Art. 20, three years period will run when the cheque is paid.

Defence : Defendant may show that the debt is not recoverable because it was advanced for an immoral or illegal purpose, or there might be a dispute about the terms of the loan if the loan is admitted.

3. The plaintiff was a minor [or insane] from the day of till the day of

4. [*Facts showing when the cause of action arose and that the Court has jurisdiction.*]

5. The value of the subject-matter of the suit for the purposes of jurisdiction is rupees, and for the purpose of Court-fee is rupees.

6. The plaintiff claims rupees, with interest at per cent from the day of 19 .

MONEY PAID (ee)

No. 81—Suit for Money paid for the defendant at his request

1. At the request of the defendant made verbally on December 20, 1924, the plaintiff paid Rs. 500 to one Kishanlal on December 21, 1924.

(ee) When the plaintiff has paid any money to a third person at the request, or by the authority, of the defendant, express or implied, with an undertaking, express or implied, to repay it, the plaintiff can bring a suit for its recovery. The liability is entirely personal and no charge is created on the property in respect of which money is paid (*Munni v. Triloki*, 1932 All. 332, 136 I. C. 66, 1932 A. L. J. 63, 54 A. 140). Examples of an implied authority to pay are furnished by Secs. 69 and 70 of the Contract Act. When the plaintiff was either compelled to pay, or was legally compellable to pay, or was interested in paying money for which the defendant was liable, the plaintiff can sue the defendant for it. For instance, if the plaintiff's property is attached in execution of a decree against the defendant and the plaintiff pays the decretal amount, he can recover it from the defendant (*Tulsa v. Jageshwar*, 28 A. 563). Similarly, he can recover what he has to pay under Order 21, Rule 89 to save his property from sale in execution of decree against the defendant (*Apparao v. Venkata*, 1941 (Mad.) 635). Similarly, a mortgagee discharging a rent decree against the mortgagor (*Jhanku v. Revati*, 19 A. L. J. 73) a mortgagee paying revenue of the mortgaged property (*Ma Mya v. Ma Lon* 1933 Rang. 112 144 I. C. 392) a Hindu widow incurring costs on the funeral of her husband (*Dalel v. Ambika*, 25 A. 266), and a sub-lessee paying rent due from the lessor (*Mathoora v. Kristo Kumar*, 4 C. 369), may recover the money so paid, even though he may be entitled to other remedies, e.g., to add the money to mortgage money. But if the plaintiff was not interested in paying the money nor was he compelled to pay it, the payment is voluntary one and the money paid cannot be recovered. The plaintiff should have a present interest and not

2. The defendant had, at the time of making the request, undertaken to pay the money to the plaintiff in six months from the date of payment with interest at 12 per cent per annum.

3. The defendant has not paid the money or any part thereof :

The plaintiff claims Rs. 500 principal and Rs. 60 interest, with interest from date of suit to that of payment.

an expectant interest. For example, a person who expects to get possession as the result of a pending litigation cannot be said to be a man interested in the property (*Nand Kishore v. Parao*, 2 Pat. L. J. 676, 42 I. C. 839). It is, however, not necessary that a person to be interested in payment should at the same time have legal proprietary interest in the property in respect of which payment is made (*G. G. Seksaria v. The State of Gondol*, 1950 A. L. J. 270 P. C.). The payment should have been actually made before a suit is brought and an undertaking given for the money is not enough to entitle the plaintiff to bring a suit. Even if a person is neither interested nor compelled to make a payment he can recover it if he had, made it *Lawfully for the defendant*, and the latter has enjoyed the benefit of the payment (*Sec. 70*), for example, payment of debts made *bona fide* by minor defendant's uncles who were supervising the defendant's business (*Muthayya v. Narayanam*, 1928 (Mad.) 317, 109 I. C. 101). The Patna High Court has held, and it is submitted rightly, that the basis of a suit under Section 70 being contractual, a minor cannot be made liable under that section as a liability which cannot be imposed by express contract cannot be imposed even by implied contract (*Bankey Behari v. Mahendra*, 1940 (Patna) 324, 188 I. C. 772). But if the payment was not made lawfully, e.g., when it was made voluntarily without any legal obligation to pay or in spite of the protest of the person on whose behalf it was made, it cannot be recovered (*Venkata v. Aruna Chalam*, 51 I. C. 857 Mad, *Radhakrishna v. Secretary of State*, 1936 (Mad.) 930). A payment made with a view to create evidence in support of a claim hostile to the defendant cannot be said to be made lawfully for the defendant (*Jinnat Ali v. Fateh Ali*, 15 C. W. N. 332, 13 C. L. J. 640, 9 I. C. 219). If money is left with a vendee to pay to a creditor of the vendor, and the vendee pays more than what was left with him, the payment cannot be said to have been made lawfully (*Suraj Bhan v. Hashim*, 40 A. 555, 16 A. L. J. 581). If the defendant was not bound to make the payment no suit can lie against him; for instance a trespasser cannot be sued for money paid by another on account of the Zamindar's due as the former was not bound to pay it (*Payida v. Barrey*, 1926 (Mad.) 152, 91 I. C. 608), nor can money paid by plaintiff on behalf of defendant who could successfully resist the claim on the plea of limitation be recovered (*Shama v. Subba*, Mys. L. J. 107).

The fact that the defendant was benefited is not enough, if the circumstances be such that he had no option to accept or reject the

No. 82—Suit for money payable by the defendant paid by the plaintiff (Sec. 69, Contract Act)

1. In execution of the decree No. 545 of 1921, passed by this Court against the defendant, the decree-holder, Ramlal, attached the plaintiff's sugarcane crop in village Barka, Pargana Moth, district Jhansi on September 20, 1925.

benefit. For instance, A believing himself to be the reversioner of B, deposits the amount of a decree against B and has the sale set aside. If it is found in a suit between A and C that C, and not A, is the reversioner, A cannot recover the amount paid by him on the ground that C is benefitted by the release of the property, as the payment was made by A at that time, not for C, but on his own behalf (*Yogambai v. Naina*, 33 M. 15). But where work was done by the plaintiff under a contract which had not been validly executed and the defendant had taken the benefit, he was made liable (*P. D. Khanna v. Secretary of State*, 38 P. L. R. 618). *State of W. B. v. B. K. Mondal*, 1962 s. c. 779, *New Marine Coal Co. v. Union of India*, 1964 s. c. 152 *Mulchand v. State of M. P.* A. I. R. 1968 Sc. 1218. Where work was done under requisition by Government on suggestions by defendant, but defendant making it clear that he would not pay for the work, it was held that work was not done for the defendant (*Governor-General v. The Municipal Council, Madura*, 1949 P. C. 39, 1948 A. L. J. 462).

In a case adjacent lands of the parties were under tanks owned by the plaintiff, and on the tanks being breached the defendant pressed for joint construction and repair under the supervision of their respective agents, but the plaintiff did not agree and himself repaired the tanks. He cannot be said to have done this "for the defendant" (*Arudayappa v. Thillai*, 111 I. C. 513, 1928 (Mad.) 320, 40 M. 185).

A contractual liability by defendant to pay the meony which plaintiff with a view to protect his own interest has to pay would also entitle plaintiff to be reimbursed and it is not necessary that the liability under Section 69 should be statutory (*Agne Lal v. Sidh Gopal*, 1940 (All.) 214, 1940 A. L. J. 20, 189 I. C. 60).

Even a voluntary payment can be ratified by a person, and if the latter agrees to compensate the payer, the payer can sue (Sec. 52 (2), Contract Act).

In any suit for money paid for the defendant, plaintiff must allege (1) payment by him, (2) defendant's request, express or implied, to make the payment, and (3) an undertaking, express or implied by the defendant to repay the money. In cases of implied request or undertaking, facts implied the same should be alleged, e.g., those showing (1) that the plaintiff was interested in making it or was acting lawfully in doing so, and (2) that defendant was bound to make the payment or that he voluntarily enjoyed the benefit of it. It is not in every case in which a man had benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or

2. On September 30, 1925, the plaintiff paid into court to the credit of the said Ramlal, Rs. 564-2-9, on account of the amount of the said decree due from the defendant, in order to have the plaintiff's crops released.

The Plaintiff claims Rs. 564-2-9, with interest from the date of suit to that of payment.

MONEY RECEIVED (ff)

No. 83—Suit for money when it was paid for a consideration which has failed

1. On February 14, 1924, the plaintiff requested the defendant, who was proceeding to Rangoon, to buy him a pair of Burma posnie, and paid Rs. 1,000 in advance to the defendant for part payment of the price.

proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. (*Lala Manmohan Das v. Janki Prasad and others*, 1945 P. C. 23 (30), 1945 A. L. J. 51).

Where an owner of a share in a well repaired the same after demanding the share of repairs from other cosharers and on their failure to pay the same sued them for contribution under Sec. 70, Contract Act it was held that the plaintiff was entitled to succeed in case, defendants enjoyed the benefit of the repairs. In this case, however, the suit was dismissed because the plaintiff had not allowed the defendants to use the well unless they paid their contribution. The defendants had not the benefit of repairs and hence were not liable to pay contribution under Sec. 70 (*P. V. Muthuswami Ayyar v. A. Velammal*, 1947 Mad. 117).

Limitation : Three years from payment of money (Art. 23).

Defence : The defendant may plead that the payment was voluntary, or that he was neither bound to make it nor was he benefitted by it, nor had he requested for it nor did he ratify the payment. In a case under Sec. 70, he may plead that the payment was not made *for him* or *lawfully*, or that it was made by the plaintiff for his own benefit, and that it was incidentally that the defendant was also benefitted (*Viswanadha v. Orr*, 45 I. C. 786 Mad.), or that the defendant had no option but to accept the benefit and the benefit was thus forced upon him. Stamp and registration expenses advanced to a company which never commenced its business are not recoverable under Sec. 70, Contract Act from the Company having regard to Sec. 103 (3) of the Companies Act, 1913 (*Ambica Textile Ltd. In re*. 54 C. W. N. 157).

(ff) Under this head fall claims technically known as claims for money had and received to the use and benefit of the plaintiff, for instance, money received by defendant on behalf of the plaintiff, money paid by

2. On February 20, 1925, the plaintiff verbally asked the defendant not to purchase the said ponies for him, and the defendant replied that he would not.

3. The defendant has not refunded the sum of Rs. 1,000 or any part thereof.

The plaintiff claims refund of Rs. 1,000 with interest from date of suit to that of payment.

No. 84—Like suit, another form

1. On August 6, 1912, the defendant borrowed Rs. 10,000 from the plaintiff at an interest of Rs. 1-4-0 per cent per mensem and executed on her own behalf and on behalf of her minor nephew Hashim Ali, a mortgage-deed for the said loan hypothecating two houses situate at.....

2. For two years after the mortgage the defendant continued to pay interest on the aforesaid loan but did not pay any interest after that nor did she pay any part of the principal amount.

3. The plaintiff thereupon instituted a suit against the defendant and her said minor nephew Hashim Ali under her guardianship and obtained a decree from this Court on April 10, 1918, for the principal mortgage money, interest and costs, to be realized by sale of the said mortgage houses.

4. The said houses were sold in execution of the decree referred to in para. 3 above and were purchased at the auction sale by one Manik Chand on May 20, 1920.

5. The said Manik Chand obtained possession of the said houses, and sold them to the plaintiff by a sale-deed dated July 15, 1920, and the plaintiff obtained possession of the said houses on July 20, 1920.

6. In or about April, 1922, the aforesaid Hashim Ali by his father as next friend, instituted in this court a suit

mistake of fact, money paid for a consideration which has failed, money paid under coercion, or recovered by fraud, or for an illegal object which has not been fulfilled, or overcharge made by a Railway Co., (*Palghat*

(being suit No. 218 of 1922) against the plaintiff to set aside the sale of the aforesaid houses and for a declaration that the mortgage of August 6, 1922 was not binding on him. The suit was dismissed by this Court but was decreed on appeal by the High Court on February 19, 1923, on the ground that the defendant had no authority to mortgage the said houses or to represent the said minor in the suit on the mortgage.

7. The said Hashim Ali has, in execution of the said decree of the High Court, dispossessed the plaintiff of the said houses on April 3, 1923.

8. The plaintiff claims refund of the sum of Rs. 10,000 advanced to the defendant with interest at 1 per cent per mensem on the ground that the consideration on which it had been advanced has failed on February 19, 1923 when the High Court set aside the mortgage and the decree obtained upon it and the sale held in execution of the said decree.

The plaintiff claims—

(1) Judgment for Rs. 10,000 for principal and Rs. for interest from August 6, 1914, when the defendant ceased to pay interest, upto July 20, 1920, when the plaintiff obtained possession of the said houses.

(2) Interest from date of suit.

No. 85—Suit for refund of money obtained by fraud

1. On September 20, 1923, the plaintiff lent to the defendant a sum of Rs. 2,000 on the defendant executing a bond for the said loan hypothecating his rights in the following 6 plots of land in village.....

* * * *

2. In order to induce the plaintiff to advance the aforesaid loan and to agree to accept the security of the aforesaid

Electric Corporation v. Veeraraghav, 1941 (Mad.) 439) or money stolen by defendant from the plaintiff (*Gaffar Khan v. Syed Noor*, 1941 (Mad.) 391). **The plaintiff must clearly set out in the plaint fact from which it can be inferred that the defendant received the money**

plots of land as sufficient, the defendant verbally represented to the plaintiff that he was proprietor of the said plots.

3. The plaintiff was induced to, and did, advance the aforesaid loan to the defendant on the aforesaid security, by, and on the faith of, the said representation of the defendant and without knowledge of the true facts.

4. The Plaintiff has since discovered on February 20, 1924, and the fact is, that the said representation was false and that the defendant is not the proprietor of the aforesaid plots of land hypothecated by him but that he had only an occupancy right in them.

5. The defendant made the said representation fraudulently, well knowing that it was false.

The plaintiff claims refund of Rs. 2,000 with interest from date of suit to that of payment.

No. 86—Suit for money paid under mistake (gg)

1. The plaintiff and one Ram Kishen owed Rs. 500 to the defendant under a bond, dated June 15, 1924, jointly executed by them.

for his use from the plaintiff. In the case given in precedent No. 83, the plaintiff can recover money on the ground that it was obtained by fraud (*Shabazad v. Narain*, 101 I. C. 257 All.). Where a transfer is set aside under Sec. 53, T. P. Act, the transferee can recover the price from the transferor (*Parasharam v. Sadasbeo*, 1936 (Nag.) 268).

Limitation : Three years from the date when the money is received (Art. 24), but when money is claimed back on the ground of future failure of an existing consideration, the time is three years from the date of failure of consideration (Art. 47). The suit in precedent No. 84 was held to be governed by Art. 97 of the Act of 1908 and could be brought within three years from the decree setting aside the sale in favour of the plaintiff (*Ma Hnit v. Fatma*, 101 I. C. 414, 52 M. L. J. 579 (p. c.)).

(gg) *Vide* Sec. 72, Contract Act. Payment made under mistake of fact can be recovered, when the mistake is in respect of the underlying assumption of the contract or transaction or is fundamental or basic (*Normwich Union Fire Insurance Society v. W. H. Price*, 151 I. C. 548, 1934 (A. L. J.) 609, 1934 p. c. 171), but not payments made under a mistake of law or in ignorance of a particular right. Tax paid to a board under the mistaken belief that property was situate within Boards Jurisdiction

2. On April 16, 1925, the said Ram Kishen paid Rs. 500 to the defendant in full discharge of the aforesaid debt.

3. The plaintiff was not aware of the said payment by the said Ram Kishen, and in ignorance of the fact, paid Rs. 500 to the defendant on April 20, 1925 in the belief that the said debt was still due.

4. The plaintiff came to know of the payment by Ram Kishen in the last week of May, 1925.

The plaintiff claims refund of Rs. 500, with interest from the date of suit to that of payment.

No. 87—Money overpaid

1. On January 4, 1926, the defendant verbally agreed to sell and the plaintiff agreed to buy the several gold ornaments detailed at the foot of the plaint at Rs. 21 per tola of gold contained in them.

2. The plaintiff and the defendant got the said ornament weighed by Ram Kumar goldsmith, who declared them to contain 400 tolas of gold, and the plaintiff accordingly paid Rs. 8,400 to the defendant.

3. On March 3, 1926 the plaintiff discovered, and the fact is, that the ornaments really contained only 340 tolas of gold and he was ignorant of this fact when he made the said payment.

4. The defendant has not repaid the sum so overpaid. The plaintiff claims the sum of Rs. 1,260 paid to the defendant in excess of the true price, with interest from date of suit to that of payment.

can be recovered under this section (*Audi Narayana v. Panchayat*, 1940 (Mad.) 660), but if it was paid under mistaken belief of legal liability it cannot be recovered (*Ramjee Rao v. Municipal Council*, 1940 Mad. 956). Mistake in the construction of a document is a mistake of law (*Shiv Prasad v. Maharaja*, 1943 (Pat.327)).

The mistake must be as between the payer and the payee and not as to any collateral matter, e.g., if a bank cashed a cheque under the mistaken belief that it has funds, it cannot recover the amount from the payee (*Chambers v. Miller*, 32 L. J. C. P. 30; *China Southern Bank v. Te Thoe*, 1926 (Rang.) 14). The mistake should be a mistake as to a fact which, if true would make the person paying liable to pay the money (*Aiken v. Short*, (1856) 1 H. and N. 210, 25 L. J. Ex. 321, 4 W. R. 645,

No. 88—Like suit, another form*(Form No. 2, Appendix A, C. P. C)*

1. On the day of 19 , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by E. F. who was paid by the defendant for such assay, and E. F. declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees—

3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.

4. The defendant has not repaid the sum so overpaid.

MORTGAGE***No. 89—Suit by a mortgagee for sale or foreclosure (hh)**

1. The plaintiff is mortgagee of the property sought

156 E. R. 1181, 108 R. R. 526; (*Lloyds Bank v. Administrator-Genreal*, 151 I. C. 1018, 1934 (Rang.) 66, 12 R. 25). A payment made under a mistake of fact common to both parties can be recovered as money had and received to the use of the person making payment. (*Tom Boeney Banett v. African Products Ltd.* 1928 p. c. 261).

The mistake should be expressly alleged with particulars. When in a suit it was alleged that the contract price was not as entered in the contract deed but was really less, it was held that these allegations did not disclose any cause of action (*U. Shew Thang v. U. Kyaw*, 1930 (Rang.) 12).

Limitation : Under the Act of 1963, the limitation was three years from the date the mistake becomes known to the plaintiff (*Art. 96*), *Tofalal v. Syed Moinuddin*, 1925 (Pat.) 765. Now the suit will be governed by *Art. 113* of the Act of 1963.

Defence : It is a food defence that a long interval of time has elapsed during, which the position of the defendant has been altered; and the plaintiff has, by his conduct, (e. g., not informing the defendant of the mistake after detecting it), made it impossible for the parties to be restored to their original position (*Raghunath v. Imperial Bank*, 27 Bom. L. R. 1129, 91 I. C. 342, 1926 (Bom.) 66).

*The law of mortgage is so vast that it is useless to make an attempt to deal with it in the small space of these foot-notes. When there is a complicated case of mortgage, the law should be carefully studied by the pleader before drafting the plaint.

(bb) A suit for sale can be brought by a simple or an English

to be sold (or foreclosed).

2. The following are the particulars of the mortgage :—

(a) *Date.* March 6, 1920.

(b) *Name of mortgagor.*—Puran Chand.

Name of mortgagee.—Sham Lal.

(c) *Sum secured.*—Rs. 4,000.

(d) *Rate of interest.*—Twelve per cent per annum with annual rests.

(e) *Property subject to mortgage.*—(1) Ten biswas share in Mahal Ramjas, village Ram Nagar, Pargana and Tahsil Ferozabad, District Agra, which has, at a partition held after the mortgage, been made into a separate Mahal, called Mahal Sahiblal; —(2) House bounded as follows and situate in Ferozabad :—(boundaries).

(f) *Amount now due.*—Rs. 4,479-4-6, as per account given at the foot of the plaint.

(3) The Said Puran Chand died in 1921, leaving three sons, Kishen Chand, defendant No. 1, Gopi Chand, defendant No. 2, and Fakir Chand. Fakir Chand also died a few months later, leaving a minor son, Balram, defendant No. 3.

4. After the said mortgage, Kishen Chand and Gopi Chand defendants Nos. 1 and 2, have sold a share in the property to defendant No. 4, and have mortgaged another share to defendant No. 5.

mortgagee, though a mortgagee is always at liberty to sue for a simple money decree (*Chinnaswami v. Kanniah*, 1937 M. W. N. 1215 (1), 46 L. W. 728). Even if a simple mortgagee is himself in possession under another usufructuary mortgage he can bring a suit for sale subject to his usufructuary mortgage (*Udaichan v. Nagina*, 50 I. C. 40 Pat; *Nazirum v. Asifa*, 100 I. C. 577 All; *Rangaswami v. Subbaraya*, 30 M. 408; *Contra Bhagwandas v. Bhagwani*, 26 A. 14). A usufructuary mortgagee or a conditional mortgagee can bring a suit for sale only when there is a personal covenant to pay the money and also the property is hypothecated for the money, for a mere covenant to pay does not give a right to sue for sale but only gives right to a personal decree (*Kanbiya Prasad v. Hamidan*, 176 I. C. 492, 1938 (All.) 418; *Kamal v. Ram Narayan*, 1930 (Pat.) 152, 120 I. C. 308; *Mohammad Abdulla v. Mohammad Yasin*, 1933 (Lah.) 151, 141 I. C. 377; *Ramlal v. Mt. Genda*, 1942 (All.) 236; *Contra Ramayya v. Gurva*, 14 M. 232; *Siva v. Gopala*, 17 M. 131). Whether there is such a covenant or not has to be gathered from the deed itself.

5. On January 20, 1921, defendant No. 6 has, in execution of a simple money decree against defendant No. 3, purchased a half-share out of the one-third share of defendant No. 3 in the mortgaged house.

6. Defendant No. 7 is a prior mortgagee of the *zamindari* property in suit under a bond, dated May 4, 1918, but the plaintiff's mortgage in suit has priority even against the mortgage of defendant No. 7, by reason of the fact that the mortgage money under the mortgage in suit was left with the mortgagee Shamlal for paying off a prior mortgage of one Ram Narayan, dated March 18, 1916, and the said Shamlal redeemed the said mortgage of Ram Narayan on March 18, 1920.

7. Shamlal, the mortgagee, died in 1922, leaving two sons, Ram Lal, defendant No. 6 and Motilal. Moti Lal has executed a sale-deed in favour of the plaintiff on September 4, 1924, in respect of his half share in the mortgagee rights under the mortgage in suit.

A prior mortgagee is not necessary party to such a suit and, the property is always sold subject to his mortgage but the court may with his consent, sell the property free from his mortgage (O. 34, v. 12). If a puisne mortgagee has priority over the plaintiff's mortgage in respect of a portion of his mortgage money the plaintiff can sell the property only after payment of such portion to the puisne mortgagee. If the plaintiff admits this partial priority in the plaint, he must offer to redeem the mortgage to the extent, and he will have to pay a court-fee for such redemption also. If he does not admit the priority, and the court finds that a puisne mortgagee has priority to a certain extent, the court will pass a decree directing payment of the prior charge. Under the rules framed by the Madras High Court under Section 104, Transfer of Property Act, a subsequent mortgagee suing on the original side of the High Court is bound to aver in his plaint that he is willing to redeem prior mortgages, and unless the Court otherwise orders, a decree for sale is not made subject to a prior mortgage.

In a plaint for sale, foreclosure or redemption, full particulars of the mortgage must be given as shown in the forms in Appendix A. C. P. C. To these particulars should be added, in the case of a suit for redemption, the conditions, if any, laid down in the mortgage-deed for redemption. But the allegations about transfers or devolution of the rights of the mortgagor or mortgagee should not be mixed in the particulars as in the C. P. C. forms. These should be separately but briefly made. It would be convenient first to state the transfers and devolutions of the rights of the mortgagor in their chronologi-

The plaintiffs—

(1) Payment of Rs. 4,479-4-6 with interest from date of suit to that of payment, or in default (sale, or) foreclosure (and possession) of the property detailed in para. 2(e) above.

(2) In case the proceeds of sale are found to be insufficient for the amount due under the decree, then, that liberty be reserved to the plaintiff to apply for a decree for the balance under O. 34, R. 6, C. P. C.

cal order, and then to state those of the rights of the mortgagee in the same order. If the description of the mortgaged property has changed owing to settlement or partition, the changed description should also be given in the plaint, after the description given in the mortgage-deed separating the two by such words as "At present corresponding to" or "which has, at the partition (or settlement) held after the mortgage, become." In every suit filed on the original side of the Madras High Court, the plaint should contain the allegation that the plaintiff has caused a search to be made in the office of the Registry of Assurances of the district or sub-district, in which the immovable property comprised in the mortgage or subject to the charge sued on is situate, for a period of not less than twelve years prior to the date of presentation of the plaint, and that he is not aware that any person other than the persons made parties to the suit has any interest in the said property (Rule 374 of Madras High Court rules).

An account of the "money now due" should be separately given at the foot of the plaint as particulars, mentioning any payments, or credit given for the profits if the plaintiff is in possession of the mortgaged property. In such cases, a paragraph should be added to the plaint in the following form: "The plaintiff has (or the plaintiff and his predecessors-in-title have) been in possession of the mortgaged property since June 20, 1921, and particulars of the profits received during the period of such possession, and credited in favour of the mortgagee, are given in the account at the foot of the plaint."

In a suit for sale it is necessary to make a prayer as in (2) of the relief in the above precedent because the form given in Appendix A to the C. P. C. provides it, though it is submitted that this is hardly necessary and the omission to make that prayer or the failure of the court to adjudicate upon such a claim cannot bar a subsequent application under O. 34, R. 6, C. P. C. (*Mohammad Abdul Ahad v. Arjun*, 1933 (Oudh) 520, 10 O. W. N. 1097)

One of the several mortgagees can sue for his share of the mortgage money, but he must make the co-mortgagees defendants if they refuse to sue (*Sunitabala v. Dhara Sundari*, 46 I. A. 272, 53 I. C. 131, 1919 (P. C.) 24). In such cases decree should direct deposit by the mortgagor or realization by sale of the whole sum due, out of which plaintiff can be paid his share. Court-fee should in such cases be paid on the whole sum due and not only on the plaintiff's share (*R. Kailasa Ayyar v. Payyabir*, 1942 (Mad.) 205). A suit by one of several co-mortgagees

No. 9c—Like suit, statutory form*(Form No. 45, Appendix A, C. P. C.)*

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage :—

(a) (date);

(b) (Names of mortgagor and mortgagee);

(c) (sum secured);

(d) (rate of interest);

(e) (property subject to mortgage);

(f) (amount now due);

(g) (if the plaintiff's title is derivative, state shortly transfers or devolution under which he claims).

to recover the amount due under the mortgage by sale of the mortgaged property without impleading the other co-mortgagees is not maintainable. The defect is not cured if the other co-mortgagees are added after the expiry of period of limitation. (*Adivappa Channappa v. Radappa Ballapa*, 1948 Bom. 211 (F. B.).

Parties :—See Chapter XII.

Limitation : Twelve years under Art. 62 from the due date of payment. If payment by instalments is provided, still according to Patna High Court, limitation would run from the due date of payment of the whole mortgage money, and not from the date of each default, though the mortgagee is entitled to sue for recovery of any instalment (*Gokul v. Sheo Prasad*, 1939 (Pat.) 433 (F. B.), 183 I. C. 523). If option is given to mortgagee to sue for whole on occurrence of any default, time does not run on default if option is not exercised (*Megh Nath v. Collector, Cawnpore*, 1947 (All.) 7, 1946 A. L. J. 315, following *Lasa Din v. Gulab Kumar*, 1932 (P. C.) 207).

Court-fees : In cases of foreclosure valuation for jurisdiction and court-fees is the amount of the *principal* mortgage money (Sec. 71 X). In case of sale, it is the total amount of principal and interest claimed by the plaintiff.

Defence : The defendant may show that the transaction does not amount to a hypothecation of the property, or that the so-called mortgage-deed is defective and does not therefore operate as such, *e. g.*, that it was not attested by two witnesses. That the mortgage money was left by the mortgagor with a subsequent transferee for payment to the plaintiff is no defence. If a puisne mortgagee is impleaded, he may show that he has discharged some mortgage prior to that of the plaintiff's and has thus obtained priority to that extent. But a person impleaded as a subsequent mortgagee cannot plead his paramount title, *i. e.*, that he and not the mortgagor was the owner of the property (*Gohardhan v. Mannalal*, 16 A. L. J. 639). But see 1937 A. L. J. 536; *Bisheshwar Dayal*

(If the plaintiff is mortgagee in possession, add—.)

3. That the plaintiff took possession of the mortgaged property on the day of (and is ready to account as mortgagee in possession from that time).

[As in paras. 4 and 5 of Form No. 1]

6. The plaintiff claims—

(1) Payment, or in default [sale or] foreclosure [and possession].

(Where Order 34, Rule 6, applies)

(2) In case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 91—Like suit where members of a joint Hindu family are impleaded (ii)

After setting out the facts as in precedent No. 90, add :—

1. The said mortgagor and defendants Nos. 1 and 2 are, and on the date of the mortgage, were, members of a

v. Jafri Begum where it has been held following 1920 (P. C.) 81, 47 Cal. 662 (P. C.) *Rcdha Kishan v. Khurshed Husain* that there is nothing in O. 34 R. 1, C. P. C. which prohibits the mortgagee from impleading in the mortgage suit any person who, he alleges, impugns his title as a mortgagee. To hold otherwise would in many instances lead to highly undesirable and inequitable results. There is no reason in law or equity for holding that the question of prior transferees' paramount title should not be decided in the mortgage suit. The Oudh Court has also held in *Mehdi Ali v. Walayat*, 1930 (Oudh) 97, O. W. N.. 25 that a mortgagee should not be allowed in his suit to raise a controversy as regards the title of third person not connected with the mortgage and claim a paramount title. A person having a paramount title is not a necessary party to the suit. If impleaded, he may apply to be discharged. If he does not so apply and an issue is framed and decided about his rights, the decision becomes binding on the parties (*Mst. Satwati v. Kali Shankar*, 1955 All. 4). The Calcutta High Court has held that the court has a discretion to entertain or refuse to entertain such a plea (*Asmatullah v. Gamir*, 33 C. W. N. 659, 1929 (Cal.) 672). An auction purchaser can impeach a mortgage made by the judgment-debtor whose rights he has purchased (*Jagannath v. Chunilal*, 1933 (All.) 180, 1933 A. L. J. 1110, 143 I. C. 736). In a mortgage suit the person claiming paramount title is not a necessary party (*Nimba Ganba v. Naraian Paikaji*, 1948 Nag. 369).

(ii) If the property mortgaged was the self-acquired property of

joint Hindu family, and the said mortgagor was at all material times the head and manager of that family.

2. The mortgaged property was the ancestral property of the mortgagor.

3. The mortgage was made by the said mortgagor to raise money for payment of Government revenue of the family *zamindari* property in village Randewa for the years 1326 and 1327. (Or, if defendants 1 and 2 are mortgagor's sons, the mortgage was made in lieu of (or to pay off) antecedent debts of the said mortgagor. *Particulars of the antecedent debts****). [Or, (if the mortgagor was not the father)

the mortgagor, no other member of the family should be impleaded in a suit for sale or foreclosure. If any one is impleaded, the suit is bad against him for want of a cause of action. It is only when the property is the joint family property, in which other members of the family besides the mortgagor have also an interest, that such other members should be joined. In such cases, **all facts making the mortgage binding on such members should be pleaded, viz.,** that the mortgagor was the manager of the family, that the mortgaged property was the joint family property, the necessity for which the mortgage was made, or the benefit which the family derived from it, or the antecedent debt for payment of which it was made, or that the mortgagee had made *bona fide* inquiries into the alleged necessity of the mortgage and was satisfied that the mortgage was justified by necessity. In the last case it is immaterial that the alleged necessity did not actually exist (*Ram Krishna v. Ratanchand*, 1931 A. L. J. 458, 1931 M. W. N. 733, 33 Bom. L. R. 988, 35 C. W. N. 841, 1931 P. C. 136, 132 I. C. 613). If the antecedent debt was not the debt of the father, but of any other member acting as manager, the necessity of such debt should also be alleged. When the plaintiff relies on inquiries it is better to allege both the actual necessity as well as, and in the alternative, the inquiries about that necessity, so that if actual necessity is not established the plaintiff can fall back on his inquiries.

If, however, the other members were neither born nor were in their mother's womb when the mortgage was made, and the mortgagor was the only member of the family then in existence, an allegation to that effect may alone be made, and it is not necessary to allege the necessity for the mortgage. So also, if the mortgage was made with the consent of the other members then in existence. But, in the latter case, unless the consent of the other members then in existence can be easily established, it will be safer to allege the necessity also as an alternative case.

If the plaintiff is not sure whether the property is self-acquired property or ancestral property of the mortgagor, he can put forward

the mortgage was made by the said mortgagor as manager of the joint family to pay off an antecedent debt, viz., debt due on a bond, dated January 6, 1919, to one Ram Bilas, and taken by the said mortgagor to pay off a decree for arrears of rent which had been passed in respect of the family holdings.]

4. Further, and, in the alternative, a few days before the mortgage it was represented by the said mortgagor that he required the loan to pay off arrears of Government revenue of village Randewa for the years 1326 and 1327, and the plaintiff (or, the said Sham Lal mortgagee) made inquiries from the village patwari Ram Lal and satisfied himself that the said representation was true.

Relief same.

an alternative case, and may then join other members and make all the allegation of necessity etc.

The mortgagee may, however, if he so likes, not implead other members of the family and may bring a suit against his mortgagor alone. In such cases no allegation of necessity, etc., need be made as the mortgagor cannot plead want of authority in him to make the mortgage. In such cases the decree will be binding on the whole family, if the circumstances show that the defendant was the manager and the property involved was joint family property (*Ramnathan v. S. R. M. M. C. T. M. Firm*, 168 I. C. 731, 1937 (Mad.) 345). In such cases it is always better to allege that the mortgagor is sued in his capacity as manager though mere omission to do so will not make the decree less binding on the whole family. (*Pirthipal v. Rameshwar*, 99 I. C. 154, 3 O. W. N. 954). If, in such a case, any other member of the family, who is not impleaded wishes to challenge the mortgage, he must, without delay, make an application to be made a defendant. If he does not and a decree is passed against his father, he may find it difficult to have the decree set aside, for it has been held in *Gauri Shnkar v. Jang Bahadur*, 79 I. C. 1008; *Nandlal v. Umrai*, 1926 (Oudh) 321 and *Lal Singh v. Jagraj Singh*, 26 A. L. J. 229, that he will not be able to do so without proving that the mortgage was made for illegal or immoral purposes. But see observations, which are of course *obiter*, in *Sukh Lal v. Murari Lal*, 1 Luck. 160, 1926 (Oudh) 263, that a son can have the question of legal necessity tried in a separate suit (See. "*Suit by or against a joint family*" in *Chap. XI*).

See also *Kira Lal v. Puranchand*, 1949 (All.) 685 (F. B.) where it has been held that if the managing member of the joint undivided estate is the father, he may by incurring debt, whether, simple or mortgage debt, as long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings upon a decree for payment of that debt.

No. 92—Like suit when mortgage made by certificated guardian

After setting out the facts as in precedent No. 89 add :—

(1) The defendant was on the date of the said mortgage a minor and one Pratap Singh who had been appointed by the court of District Judge, Delhi, by order Dated , as the guardian of his property executed the said mortgage on behalf of the defendant under permission of the said court granted by its order dated for the purpose of discharging the debts of the defendant particularized below.

Particulars :—

(2) Alternatively, if the said permission be held to be ineffective or invalid the plaintiff claims restitution of the money advanced by him on the ground that the defendant's estate has been benefited by the discharge of the debts particularized in the preceding paragraph.

Add the following prayer,

Alternatively the plaintiff claims Rs. by way of restitution.

No. 93—Suit for redemption with allegations of satisfaction (jj)

1. The plaintiff is the mortgagor of (or transferee of mortgagor's rights in) the property sought to be redeemed.

2. The following are the particulars of the mortgage :—

(a) to (e), as in No. 90.

(f) Noting is now due.

(g) *Condition of redemption.*—Mortgagor may redeem at any time on payment of what is due.

Defence : The defendants may plead that they and the mortgagor were separate, or that the mortgagor was not the manager of the family. They may deny the allegations of necessity and may plead that, in any case, there was no necessity for the high rate of interest stipulated in the mortgage-deed. Unless a definite plea that the particular debt was incurred for immoral or illegal purposes is taken, it is needless to make general allegations of immorality of the mortgagor.

(jj) As to who is entitled to redeem, see Sec. 91, Transfer of Pro-

3. The said mortgagor sold his rights and interest in the said mortgaged property to the plaintiff by a sale-deed, dated April 6, 1925.

3 (or 4). The defendant has been in possession of the mortgaged property since the date of the mortgage, and it was agreed by the terms of the said mortgage that the net profits of the said property should be first applied to the payment of interest, and that any surplus should be applied to the liquidation of the principal.

4 (or 5). The plaintiff claims that the whole mortgage money has been satisfied by the profits of the property, and that there is a surplus of Rs. 1,000 in the defendant's hands, but if the Court finds any sum still due to the defendant plaintiff is ready and willing to pay it.

The plaintiff claims—

(1) Redemption of the said property without any payment, or on payment of any sum the court may, on account taken from the defendant, find to be due, and possession of the same.

(2) Rs. 1,000 or any other sum found due on account of the surplus, with interest at 6% per annum or at such rate as the court may deem reasonable.

Or, (simply)—

- (1) Redemption;
- (2) Possession of the said property;
- (3) An account of the sums received or disbursements made by the defendant as mortgagee and payment of the surplus found due to the plaintiff with interest, tentatively fixed at Rs. 1,000.

percy Act. The plaintiff can succeed only on proof of the specific mortgage set up by him and not merely on proof that there was a mortgage (*Gavri Shanker v. Lalla*, 171 I. C. 437 Oudh; *Mangilal v. Chunnilal*, 1936 A. M. L. J. 121). Ordinarily the whole mortgage money should be paid. A plaintiff is not entitled to claim partial redemption on payment of a proportionate sum, unless the integrity of the mortgage has been broken by the mortgagee (or all the mortgagees) acquiring a share of the mortgaged property. Under Sec. 60 of the T. P. Act, the integrity of a mortgage is broken only if the mortgagees have acquired in whole or

No. 94—Suit for sale by an equitable mortgagee*

1. On the the defendant borrowed Rs. from the plaintiff agreeing to repay the same with interest thereon at 12% per annum within 3 years.

(2) At the time of taking the loan defendant deposited with the plaintiff the following documents of his title to the property mentioned at the foot of the plaint with intent to create a security on the said property for the repayment of the said loan (and immediately after the completion of the

in part the share of a mortgagor. (*Shiva Harakh Rai v. Akbar Ali*, 1947 A. L. J. 244). In such cases each mortgagor can redeem his own share only and cannot redeem the whole (*Zaibun-nissa v. Maharaj Prbhu Narain*, 39 A. 618). In all such cases he must make the other co-mortgagors parties to the suit (*Ahmed Husain v. Md. Kasim*, 1926 (All.) 46, 24 A. L. J. 88, 90 I. C. 80; *Durga Prasad v. Chumi*, 1940 (All.) 528). But the fact that the mortgagee has allowed one mortgagor to redeem his share does not entitle other mortgagors to redeem their shares piecemeal but any other mortgagor must redeem the whole (*Shah Ram Chand v. Parbhu Dayal*, 1942 (P. C.) 50). A single suit should be brought for redemption of the whole mortgage, and even the fact that the mortgagee rights in different portions of the property have been transferred to different persons will not justify separate suits against such persons (*Purshotam v. Isab*, 104 I. C. 648, 29 Bom. L. R. 1052).

Full particulars of the mortgage with condition, if any, laid down in the deed for redemption must be alleged, also offer of the money due.

If there has been previous tender of the mortgage money, it should be alleged in the plaint, as the mortgagee's right to interest ceases and the plaintiff becomes entitled to profits of the mortgaged property from the date. If there has been no previous tender, an offer to pay the mortgage money should be made in the plaint itself. A suit cannot be dismissed merely for want of a previous tender (*Raghumandan v. Raghumandan*, 19 A. L. J. 573 (F. B.)). If no money is due, there should be an allegation to that effect.

*No writing is required to create such a mortgage but usually a memo is drawn up. If the memo is intended to be the mortgage it is inadmissible without registration, and oral evidence would be inadmissible (*Hari Ram v. Kedarnath*, 1939 (P. C.) 167), but if the memo is only an evidence of a completed transaction, it is admissible (*Ram Sarup v. Shiva Dayal*, 1940 (Lah.) 285).

The plaintiff may claim that the mortgage has been satisfied by the usufruct of the property and no money is due, and may in the alternative, offer to pay whatever the court might find to be due, and this is the safest course to adopt in all cases in which satisfaction is alleged. It has been held in Bombay that a redemption suit without such offer is bad and should be dismissed (*Purshotam v. Vasant*, 1943 (Bom.) 259,

transaction executed a memorandum to that effect, which is annexed to the plaint).

Particulars of the documents

(3) The defendant has not paid any thing towards the said loan and Rs. _____ is now due on account of principal and interest.

Prayer—(Same as in case of suit for sale on simple mortgage).

No. 95—Suit for Redemption

(Form No. 46, Appendix A, C. P. C.)

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage :—

- (a) (date);
- (b) (names of mortgagor and mortgagee);
- (c) (sum secured);
- (d) (rate of interest);
- (e) (property subject to mortgage);
- (f) (If the plaintiff's title is derivative, state shortly transfers or devolution under which he claims).

(If that defendant is mortgagee in possession, add). —

3. The defendant has taken possession, [or has received the rents] of the mortgaged property.

[As in paras. 4 and 5 of form No. 1]

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him [and have possession thereof].

No. 96—Like, after tender of mortgage money

1. The plaintiff is the mortgagor of the property sought to be redeemed.

2. The following are the particulars of the mortgage:—

- (a), (b), (c) and (e) as in No. 90.

45 Bom. L. R. 489). Any balance left in the mortgagee's hands after satisfaction of the mortgage debt should be claimed with interest.

(d) *Rate of interest*.—Nil. Profit of mortgaged property to be taken by defendant in lieu of interest.

(f) *Amount due*.—Rs. 4,000.

(g) *Condition of redemption*.—Mortgagor may claim redemption, in the month of Jeth any year, on payment of the principal sum.

3. On May 20, 1924, in the month of Jeth the plaintiff deposited Rs. 4,000 for the defendant in court, along with an application under Section 83, Transfer of Property Act.

4. The defendant was served with a notice of the said deposit on—, in the month of Jeth, but he did not appear to accept the tender on the date fixed by the court, which was July 4, 1924. The money is still in deposit.

The plaintiff claims—

(1) Redemption of the mortgage and possession of the mortgaged property.

(2) Rs. 150, on account of mesne profits of the property for one year, i.e., from July 4, 1924, up-to-date, as per details given below.

(3) Future mesne profits upto the date of delivery of possession at the same rate.

Details of mesne profits

				Rs.
Gross rental	..	..	..	290
Government Revenue	..	..	..	140
		Total	..	150

If money is not paid under a preliminary decree for redemption another suit for redemption can be brought, as so long as a final decree extinguishing the right of redemption is not passed, the right can always be enforced (*Joti Lal v. Sheodhayan Pd.*, 163 I. C. 908, 1936 Pat. 420).

Limitation : Thirty years under Art. 61 (a).

Court-fees : The court-fee payable is an *advalorem* fee on the principal money secured by the mortgage but valuation for purposes of jurisdiction in case mortgagee is in possession and the plaintiff sues for possession, should be the value of the land (*Ma Hla Saing v. Na Sunve* 5 R. 499, 105 I. C. 412). No additional court-fee will be required even if surplus money is claimed as being due on taking account (*Chbiddu v. Jhanjhan*, 45 A. 154, 79 I. C. 303, 1923 (Al.) 26; *Mt. Wajidbegum v. Abdulgani*,

No. 97—Suit for partial redemption

1 and 2. (as in the last precedent).

3. The defendant No. 1 has by a sale-deed executed on the and registered on the acquired the 1/5th share of defendant No. 5 in the mortgaged property, and the plaintiff, therefore, claims redemption of his 1/5th share only on payment of the proportionate mortgage money.

3 and 4. (as in last precedent substituting Rs. 800/- for Rs. 4, 000/-).

The plaintiff claims—

(1) Redemption of the mortgage and possession of his 1/5th share of the mortgaged property.

(2) and (3) as in last precedent substituting 30, 58 and 28 for 150, 290 and 140).

No. 98—Suit by a mortgagee for mortgage money or for possession (kk)

1. The defendant No. 1 usufructuarily mortgaged the property detailed below to the plaintiff, by a mortgage deed,

113 I. C. 34, 1929 Nag. 1). A doubt was expressed about this in *Vasudeva v. Madhava*, 16 M. 326.

Defence : The defendant, though admitting his possession as a mortgagee, may deny the specific mortgage sought to be redeemed, as the plaintiff can redeem only the specific mortgage on which he sues (*Gawri Shankar v. Lala*, 1938 (Oudh) 16, 171 I. C. 437). He may deny a previous tender, as, although want of a valid previous tender is not fatal, yet it may affect the question of costs, if the defendant has no other objection to the suit.

Sometimes a tacking bond is set up by the defendant, and if it is legally payable along with the mortgage, the amount due under it may be claimed along with the mortgage money. The defendant may deny his possession for the period alleged by the plaintiff, and the amount of profits received by him, if they were to go in liquidation of the principal also.

(kk) Every mortgagee in whose mortgage there is a personal covenant to pay, can forego his mortgage security and sue for a personal decree for the mortgage money provided the claim is within limitation. Limitation in such cases used to be six years in the case of registered bond, and three years in case of an unregistered bond. (*Ma Pua v. Ma Me Tha*, 161 I. C. 462, 1936 (Rang.) 80) but is only three years under the Act of 1963. When the mortgage is defective and cannot be

dated the 19th June, 1923, for a consideration of Rs. 2,000 and put the plaintiff in possession from July 1, 1923.

Details of the property

* * *

2. The defendant No. 1 by a deed, dated June 20, 1925, mortgaged with possession the said property to defendant No. 2.

3. Under colour of the said mortgage in his favour, defendant No. 2 dispossessed the plaintiff of the mortgaged property on July 4, 1925.

enforced as mortgage, a suit for a personal decree can be brought upon it if there is a covenant to pay. Even a suit for sale can, on detection of such a defect, be amended by addition of a prayer for a simple money decree.

A suit for mortgage money will lie at the instance of the mortgagee, even when there is no personal covenant to pay, in cases referred to in Clauses (b) and (c) of Sec. 68. In such cases court has no power to insist on the plaintiff filing a suit for sale, even if he can do so (*Chinnasami v. Kanniah*, 1938 (Mad.) 132, (1937) 2 M. L. J. 920, 171 I. C. 593). The decree will be personal in the case of a purely usufructuary mortgage, but in a case of a combined usufructuary and simple mortgage the plaintiff may claim a decree for sale (*Narsingh Partab v Mohd. Yaqub*, 1929 (P. C.) 139, 116 I. C. 414, 56 I. A. 299).

It must be remembered that the statutory liability for dispossession or disturbance of possession is purely personal, and a suit for sale cannot be brought under Sec. 68 (b) or (c). (*Monundo Devi v. Indu Bala*, 1964 s. c. 1295). If a bond, however, contains a clause of hypothecation in case of dispossession or disturbance, a suit for sale may be brought on the basis of such clause and the limitation will then be twelve years. Interest may be claimed though not provided for in the bond, under the Interest Act. In fact, when a plaintiff is kept out of possession, he must get interest on his money (*Sitanath v. Thakurdas*, 46 C. 448). Where a usufructuary mortgagee granted lease of the property to the mortgagor at an annual rent equal to interest, non-payment of rent was held to be equivalent to non-payment of interest so as to give the mortgagee a right to sue for principal and interest due on the mortgage, and the defence that the mortgagee should sue for rent under the lease was overruled (*Chaitan Prakash v. Mumtaz Ahmad*, 1937 A. L. J. 1171, 172 I. C. 63, 1937 (All.) 762).

Court-fee in a suit for possession calculated on the principal amount of the mortgage money. If interest is also claimed, an additional fee is payable on its amount. In an alternative suit such as in the above precedent, fee on the higher relief, viz, on the amount claimed as principal and interest, is payable.

In a suit under Clause (a) of Sec 68, T P Act, the plaintiff has

The plaintiff claims—

- (1) Possession of the property.
- (2) Rs. 80 on account of mesne profits for one year from defendant No. 2, as per account given below.
- (3) In the alternativa, Rs. 2, 000 principal and Rs. 160 interest from July 4, 1925 upto date, at the usual rate of 1 per cent per mensem under the Interest Act, with further interest from date of suit to that of payment, from defendant No. 1.

NECESSARIES OF LIFE (II)

No. 99—Suit for necessities of life supplied

1. Defendant No. 1 is the wife of the defendant No. 2

simply to allege that the defendant covenanted to repay the mortgage money. In a claim under Clause (b), he should allege (1) the fact of his having been deprived of the security, and (2) the wrongful act or default of the mortgagor which resulted in such deprivation. In a claim under Clause (c) the plaintiff must allege (1) that he was entitled to possession and (2) either, that the mortgagor failed to deliver it, or that his possession was disturbed by the mortgagor or any other person, and (3) if it was disturbed by any other person how was the mortgagor responsible for such disturbance as a dispossession by a mere trespasser does not make the mortgagor liable (*Nakodi v. Ram Charitar*, 19 A. 191).

To a suit for mortgage money may be added an alternative prayer for possession, and *vice versa*. If in a suit for possession against the mortgagor, the plaintiff omits to claim recovery of mortgage money he cannot bring a suit for that afterwards (*Ram Autar v. Shanker Dayal*, 90 I. C. 622, 1926 (Pat) 87). If the plaintiff has been dispossessed by a third person, even though at the instance of the mortgagor, and he wants to sue for possession only and not for money he should sue the trespasser alone and the mortgagor is not a necessary party.

Defence : In a suit under Clause (a), the defences which are available in a suit on a simple money bond may be raised. In other suits, the legality of the mortgage may be attacked, or it may be pleaded that the plaintiff did not himself take possession, or gave up possession or intentionally procured his dispossession by colluding with a third person.

If a suit for possession is brought on a term of the mortgage that in case of non-payment on a certain date the mortgagee may take possession, the mortgagor cannot claim to redeem, but he must bring a separate suit for possession (*Bed Nath v. Rajeshwari Devi*, 1937 (Oudh) 406, 168 I. C. 72, 1937 O. W. N. 825; see *Contra Bakhtawar Singh v. Bakhtawar Singh*, 78 I. C. 232 Oudh).

- (II) A suit for recovery of the price of necessities of life supplied

2. Defendant No. 1 is living with defendant No. 2 and her children and is managing the family affairs and has been doing so at all material times.

3. Between Sept. 20, 1942, and August 25, 1944, defendant No. 1 purchased certain goods from the plaintiff. Particulars of the goods purchased with the prices are given at the foot of the plaint.

4. The said goods were articles of food necessary for defendants and their family and suitable to the position of the family.

The plaintiff claims Rs. being the price of the said goods with interest from the date of the suit.

**No. 100—Suit for necessities supplied to wife
living separately**

1. Defendant No. 1 is the wife of defendant No. 2 and was until the 2nd October 1943 living with him.

2. On the 2nd Oct. 1943 defendant No. 2 without any cause or justification, expelled her from his house (or, defendant No. 1 by reason of the cruelty of defendant No. 2 was compelled to leave the house of defendant No. 2 (*Particular of Cruelty*.....)).

3. Since the 2nd Oct. 1943 defendant No. 1 has been living apart from defendant No. 2 and defendant No. 2 has refused to provide her maintenance.

4. After the said date defendant No. 1 ordered from the plaintiff and the plaintiff has sold and delivered to her goods on credit, particulars of which are given at the foot of the plaint.

to a person who cannot contract, such as a minor or a person of unsound mind, is recognised by S. 68, Contract Act and lies against the minor's property. Similarly, a suit will in some case lie against a husband for necessities supplied to a wife on account of the legal duty of the husband to maintain his wife and the consequent implied agency of the wife to pledge the credit of her husband for such purposes (*E. T. Robinson v. Mrs. R. V. Rigg* 1936 (All.) 393), 160 I. C. 874, 1936 A L. J. 50) though, unlike the case in England, he is not ordinarily liable for her debts. If she lives apart from the husband without any justification the husband will not be liable even for necessities supplied to the wife

5. The said goods were necessary for the maintenance of defendant No. 1 according to her position in life.

The plaintiff claims Rs. on account of the price of the said goods with interest from date of suit, from defendant No. 2, and in the alternative from defendant No. 1.

NEGOTIABLE INSTRUMENTS (mm)

No. 101—Suit on a bill of exchange by endorsee against acceptor

1. On September 20, 1925, at Agra, one Sham Lal, by his bill of exchange directed to the defendant, required the said defendant to pay to one Ram Lal Rs. 3,000 on demand.

2. On September 30, 1925, the defendant accepted the said bill of exchange.

3. The said Ram Lal endorsed the same to one Sri Lal and the said Sri Lal endorsed it to the plaintiff.

4. The defendant has not paid the same.

but if her separate living is justified e.g., by husband's cruelty, husband would be liable. It is safe to implead the wife and claim a decree against her in the alternative.

Defence : Husband may plead that he has been supplying necessaries himself and the wife did not need anything or that she has no justification for living separately from him or that he had warned the tradesman that he would not be responsible.

(mm) This term includes a promissory note, bill of exchange, or cheque payable to order or bearer. Even if such a note or cheque is payable to a particular person, it is presumed to be payable to his order unless it contains words expressly or impliedly showing an intention that it shall not be transferable (Sec. 13, Neg. Inst. Act). A document not containing an unconditional promise to pay, or not specifying person to whom money is payable, is not a promote (*Narbada Prasad v. Mt. Sunki*, 1938 Nag. 464, 177 I. C. 889).

It is only a person who comes into possession of a negotiable instrument having paid consideration for it and being a *bona fide* transferee that can be a holder in due course within the meaning of S. 9. S. 9 implies and contemplates that there must be a negotiation or transfer to the holder in due course by some one who had the authority to transfer or negotiate the negotiable instrument. The transfer and the negotiation must be of a negotiable instrument, not the transfer for an inchoate document which is not negotiable instrument at all under the Act. From the point of view of the proviso to the section, it may also be said that in

The plaintiff claims—

(1) Rs. 4,260.

Principal

Interest

4,000

260

Total 4,260

(2) Interest from date of suit to that of payment.

No. 102—Suit by payee against drawer for non-acceptance

1. On September 20, 1925, at Agra, the defendant by his bill of exchange directed to Ram Lal, required the said Ram Lal to pay to the plaintiff Rs. 4,000, twenty-one days after sight.

the case of an inchoate document it would be difficult to hold that the possessor of it is *bona fide* transferee or possessor of the negotiable instrument. (*Tara Chand Kewal Ram v. Sikri Brothers*, 55 Bombay L. R. 231).

In a suit based on a handnote the person signing the document is the person actually liable, and no evidence is admissible to prove that it was executed on behalf of an undisclosed principal. Having regard to the character of such instrument which constantly passes from hand to hand, it would be dangerous to permit evidence to be adduced so as to find persons whose names are not disclosed on the face of the note itself or to hold that the person signing the negotiable instrument was only an agent for undisclosed principal. (*Pramod Kumar Pati v. Damodar Sabu*, A. I. R. 1953 Orissa 179).

The Negotiable Instruments Act nowhere specifically provides as to who is entitled to institute a suit to recover money due on a negotiable instrument. From sec. 78 of the Act, it cannot be argued that the right to institute a suit on the basis of negotiable instrument vests merely in the holder of the instrument and in no other person. Obviously when there is no holder, the right to recover the money on the instrument, in case the holder dies passes to his legal representative, and in other case when the holder loses his status as such for any other reason, passes to the person who becomes entitled to the money due under the instrument (*Ram Kishore v. Ram Pd. Misir*, 1952 A. L. J. 8).

In a suit on a promissory note it is not necessary to aver consideration or to prove it. The Court places the burden upon the defendant to prove want of consideration. But in a case where the plaintiff does not rely upon the promissory note 'per se' but pleads certain facts in his plaint which militate against the presumption naturally arising from the document, the presumption will be displaced by the act of the plaintiff himself. Where, therefore, the plaintiff has himself shown that the date which the promissory note bore was not the date on which it was exe-

2. On September 25, 1925, the same was duly presented to the said Ram Lal for acceptance and was dishonoured.

3. On October 22, 1925, the plaintiff by a letter of the same date gave notice of the said dishonour to the defendant, but the defendant has not paid the amount of the said bill.

Prayer as in the last precedent.

cuted and the sum which was actually handed over, it is impossible to take recourse to the presumption contained in S. 118 and (a) (b) Negotiable Instruments Act and it is the plaintiff who has deprived himself of the presumption by pleading facts contrary to what would be presumed (*Ful Chand v. Laxmi Narain*, A. I. R. 1952 Nag. 308).

If in a suit loans had been proved to have been contracted for the purpose of the family, there is nothing in the Negotiable Instruments Act which would debar the plaintiff from suing upon the hand notes so as to make the family liable (*Pramod Kumar Pati v. Damodar Sabu*, A. I. R. 153 Orissa 179).

A cheque is under the law a negotiable instrument. Its negotiability can be destroyed only if it is marked as "not negotiable" on its face, it is not destroyed by its simply being crossed whether generally or specially. (*Durga Shah Mohan Lal v. G. G-in-Council*, 1951 A. L. J.

A promissory note payable on demand can be endorsed to a person who will be a holder in due course until demand is made for payment of the sum due under the note (*Doongar Mal Kissan Lal v. Shambhu Charan*, A. I. R. 1951 Calcutta 55).

S. 46, Negotiable Instruments Act and S. 92, Evidence Act, should be read together. If a contemporaneous oral agreement amounts to postpone liability under a promissory note which is payable on demand until the performance of a certain condition, then evidence of such agreement would be admissible under proviso 3 to S. 92, Evidence Act. If on the other hand the agreement only amounts to an agreement for postponement of the payment, evidence of such an agreement cannot be given as it is in direct conflict with the terms of the note (*Dungar Mal Kissen Lal v. Sambhu Charan*, A. I. R. 1951 Cal. 55).

A consideration of a negotiable instrument is presumed (Sec. 118) (a), it need not be alleged in the plaint, as in cases of bonds or other contracts. *Shan Mugha Rajeswara v. Chidambaram Chettiar*, 1938 (P. C.) 123, 42 C. W. N. 565, 1938 A. L. J. 292, 173 I. C. 772; *Rishikesh v. Brij Mohan*, 1941 O. W. N. 613, 193 I. C. 863; *Raghunath v. Nangbutu*, 176 I. C. 725, 1941 O W N. 613

A promissory note of bill of exchange payable on demand, or in which no time is specified is payable at once, while one payable on a specified date becomes due on the third day after that day, and if the later day is a public holiday under the Neg. Inst. Act, the instrument falls due on the next preceding business day (Sec. 25), and no action can lie on such an instrument before the day on which it falls due.

A bill of exchange and a pronote must be presented for acceptance

**No. 103—Suit by an endorsee against his endorser
for non-payment**

1. The defendant endorsed to the plaintiff a bill of exchange now overdue purporting to have been made by one Sham Lal on September 20, 1925, at Agra requiring one Ram Lal to pay to the order of the defendant Rs. 4,000, twenty-one days after sight, and accepted by the said Ram Lal on September 30, 1925.

2. On October 21, 1925, the same was presented to the said Ram Lal and was dishonoured.

3. As in last precedent.

Prayer.

in cases in which it is so required by Secs. 61 and 62, and must be presented for payment as required by Sec. 64. A Promissory note payable on demand and not payable at a specified place need not be presented for payment. But a Hundi not payable at a specified period after date or sight but made payable on the same day is not governed by Sec. 66 and should be presented within a reasonable time (*Firm Harnam Singh v. Firm Nikha Ram*, 1938 (Lah. 183). Want of presentment exempts the endorser (*Benares Bank v. Pirya Das*, 1930 (All.) 106)

The plaintiff in a suit on a negotiable instrument must show its date, amount and parties thereto. It must allege whether the defendant is the maker, or the acceptor or the endorser of the instrument. If the defendant in a suit on a bill or a cheque is the drawer or the endorser, the fact that a notice of dishonour was sent or facts relied on as excusing the giving of such notice must be alleged in the plaint. (*Friibauf v. Grosvernor and Co.*, 61 L. J. Q. B. 717) for the giving of this notice is not a mere condition precedent but is a necessary element in the plaintiff's cause of action, as no party can be made liable unless such notice was sent to him, except when such notice is unnecessary under Sec. 98. Notice may be oral or written, and may be in any form but it must be given within a reasonable time. In cases of foreign bills and when an acceptor for honour is to be charged, notice of protest should be sent instead of a notice of dishonour (Sec. 102), and the fact should be alleged in the plaint. In other cases, even if the dishonour has been noted and notice of protest sent, the facts need not be alleged.

The fact of the presentment or dishonour must also be alleged, where presentment is required as in such cases presentment gives the cause of action. In cases mentioned in Sec. 76 no presentment is necessary and none need be alleged. In a suit against the drawer presentment need not be alleged (*Phul Chand v. Ganga Ghulam* 21 A. 450). If the drawer and the drawee are one person, presentation is not necessary (*Pachkaurilal v. Mulchand*, 44 A. 554, 20 A. L. J. 437, 1922 (All.) 279, 66 I. C. 503; *Shankardas v. Dittumal*, 99 I. C. 875, 8 L. L. J. 604)

No. 104—Suit by an endorsee against drawer, acceptor and endorser

1. On September 20, 1925, at Agra, Ram Lal, defendant No. 1, by his bill of exchange now overdue directed to Sham Lal defendant No. 2, required the said Sham Lal to pay to the order of Sri Lal, defendant No. 3, Rs. 4,000, twenty-one days after sight.

2. On September 30, 1925, the said Sham Lal defendant No. 2 accepted the same.

3. The said Sri Lal defendant No. 3 endorsed the same to the plaintiff.

4 On October 21, 1925, the same was presented to the said Sham Lal defendant No. 2 for payment and was dishonoured.

5. On October 22, 1925, the plaintiff by letters of the same date, gave notice of dishonour to each of the defendants, but none of the defendants has paid the amount of bill.

Prayer.

The plaintiff may claim interest at the contractual rate from the date of suit to that of realization also, and, though the court is not bound to award it at the rate of the whole of that period; the court is bound to award it at the rate at least upto a certain date after the institution of the suit to be fixed by it (Sec. 79). When no interest is mentioned in the instrument, the plaintiff is entitled to charge interest, not under the Interest. Act, 1839, but under Sec. 80, Neg. Inst. Act, at 6 per cent *par annum*.

Under Sec. 80, interest on a promissory note payable on demand can be allowed from the date of the promissory note (*Ganpat v. Sopana*, 52 B. 88; *Manghu Lal v. Bhan Partap Singh*, 165 I. C. 243 (1), 1936 O. W. N. 876; *Ghasi Patra v. Brahma Thati*, 1962 Orissa 35 *Contra Best v. Haji Muhammad Sait*, 23 M.18, in which interest was allowed from date of demand).

In the case of promissory note payable on demand, no demand is necessary to charge the maker and none need be alleged in the plaint as the money under such a promissory note is immediately payable. (*Meghraj v. Johnson*, 11 N. L. R. 189; *Sb. Jamu v. Muhammad Ibrahim*, 1926 (Nag.) 194; *Framroz v. Mohamed Essa*, 1926 (Bom.) 241, 28 B. L. R. 41), but in the case of one payable at a specified time after demand, must be alleged.

Parties : Any holder can sue all the prior parties in his own name. The suit may be brought by an agent, or by a principal on promissory

No. 105—Suit by endorsee of cheque against endorser

1. On September 20, 1958, one Sham Lal drew a cheque for Rs. 4,000 on the State Bank of India, Lucknow Branch, payable to one Ram Lal or order.

2. The said Ram Lal endorsed the said cheque to one Sri Lal, and the said Sri Lal endorsed it to the defendant and the defendant endorsed it to the plaintiff.

3. On October, 20, 1958, the plaintiff presented the said cheque for payment at the State Bank of India, Lucknow Branch, but the same was dishonoured.

4. On October 21, 1958, the plaintiff by a letter of the said date, gave notice of the said dishonour to the defendant but the defendant has not paid the amount of the said cheque to the plaintiff.

Prayer.

executed in the name of the agent (*Devichand v. Col. Sir Raja Jaichand*, 90 I. C. 1047), or by an assignee, for the fact that a pronote is transferable by endorsement does not prevent its transfer by assignment (*Surath v. Narayan*, 150 I. C. 925, 61 C. 425, 1934 (Cal.) 549, 28 C. W. N. 465; *Motilal v. Punjaji*, 1933 (Nag.) 160, 144 I. C. 411; *Contra B. S. Bhagwan Singh v. Backeshi Ram*, 1933 Lah. 494; *Jailal v. Jagmohan*, 1937 (Oudh) 405, 168 I. C. 922). A payee of a cheque has no cause of action against the banker on whom the cheque is drawn (*Punjab National Bank v. Bank of Baroda*, 1941 (Cal.) 372; *U. P. Union Bank v. Messrs Dina Nath Raja Ram*, 1953 All. 637, A member of a joint Hindu family can sue on an instrument endorsed in his name without joining other members. If a pronote is in favour of a joint family firm, individual members composing the family at the time of the execution can sue (*Madhubai v. Vadi Lal*, 181 I. C. 808, 1939 (Bom.) 147) or even the adult members at the time of suit who are capable of giving a valid discharge on behalf of the family (*Damel v. Man Mohan Das*, 1940 (Bom.) 164 188 I. C. 618). Father alone can sue on a Hundi in favour of Karta father and minor son (*Lala Ram v. Ram Saroop* A. I. R. 1964 All 495) A reversioner cannot be sued on an instrument executed by a Hindu widow (*Ramaswami v. Sellatami Lal*, 4 M. 375; *Dhiraj v. Manga Ram*, 19A. 300), but the Bombay and Calcutta High Courts hold a contrary view (*Rameshwar v. Provaboti*, 20 C. L. J. 23; *Sankrabhai v. Magan Lal*, 26 B. 206), nor can a master be sued on a pronote executed by the servant (*Lallu Ram v. The Deputy Commissioner, Kheri*, 165 I. C. 578 (2), 1937 (Oudh) 65). An agent signing a pronote on behalf of principal can by appropriate words exclude his personal liability (S. 28); but trustee cannot do so. (*P. Bala Venkatram v. Marutha Mulhu*, 1943 (Mad.) 247).

No. 106—Suit by bearer or indorsee of a crossed cheque against drawer

1. On September 20, 1958, the defendant drew a cheque upon Messrs. Grindlay & Co., Calcutta for Rs. 4,000 payable to Sham Lal or bearer (or order).

2. The said cheque before presentment for payment was crossed generally under the provisions of the Negotiable Instruments Act, 1881.

3. The Plaintiff became the bearer of the said cheque (or, the said cheque was endorsed by the said Sham Lal to the plaintiff).

4. On October 5, 1958, the said cheque was duly presented for payment by the State Bank of India, Calcutta, at the said Messrs. Grindlay & Co.'s and was dishonoured.

Para. 5 (as para. 3 of the last precedent.)

Prayer.

Every prior party is liable to a holder in due course until the instrument is satisfied. The maker and the acceptor are respectively liable as principal debtors and other parties are liable as sureties. A subsequent surety can be impleaded in the same suit (*C. T. A. C. T. Firm b. Maung Aye*, 1937 (Rang.) 197, 171 I. C. 527). All must be joined in one suit. Members of a joint Hindu family cannot be impleaded in a suit on a promissory note executed by the *Karta*, even for family necessity. The plaintiff can join them only if he brings a suit on the original consideration (*Ram Gopal v. Dbirendra*, 31 C. W. N. 357, 54 C. 380, 1927 (Cal.) 376; *Thakur Pd. v. Ajodhya Pd.* 180 I. C. 365, 1939 (Pat.) 490; *Ramanathan v. Muthuraman*, (1941) 2 M. L. J. 816; *Mahadebi Ram v. Jagannath Pd.*, 1942 (Pat.) 337), but even then their liability is not personal (*Jiwandas v. People's Bank*, 1937 (Lah.) 926), and even the joint family property will not be liable unless it is proved that the debt was binding on the family, e.g., that it was taken for a legal necessity or for the benefit of the family (*Srikant Lal v. Sidheshwari Prasad*, 170 I. C. 357, 937 (Pat.) 455). In this last case the question of the right of the manager to contract loans on pronote for the benefit of the family has been fully discussed. The Nagpur and Calcutta High Courts have, however, held that a suit can be brought against a joint family on a pronote executed by the *Karta*, but the liability of other members will have to be established, (*Sagarmal v. Bhikusa*, 1936 (Nag.) 252; *Gendulal v. Janglal*, 1948. Nag. 131; *Sm. Lilavati v. Guru Prasad*, 1947 Cal. 259, 274 I. C. 586). Similarly, other partners can be made liable on a pronote executed by one partner for the benefit of the partnership, provided *an independent contract* (apart from the mere execution of the pronote) is alleged, and in such cases evidence of such independent contract can be given (*Venkatachala v.*

No. 107—Suit on a hundi (by a payee)

1. The defendant drew a *hundi* on January 10, 1924, in favour of the plaintiff on the firm Lachmi Narian Panna Lal of Kanpur, for Rs. 1,000, payable 21 days after date.

2. The plaintiff presented the said *hundi* to the said firm Lachmi Narain Panna Lal at their place of business at Kanpur, after maturity, but the said firm refused to honour or accept it.

3. A notice of dishonour was sent by the plaintiff to the defendant by post on February 5, 1924.

The plaintiff claims Rs. 1,000 principal and Rs. 40 interest at the usual rate of 6 per cent per annum, with further interest from date of suit to that of payment.

Ramakrishnayya, 1930 (Mad.) 168). Where a partner signed a pronote as "X managing partner of firm XY" it was held that X was acting on behalf of the firm and the firm can be made liable on the original consideration (*Chandan Mal v. Mt. Krishna Kumari*, 1944 (Oudh) 273), but if pronote is proved to be executed on behalf of the firm, the other partner can be made liable thereon (*Pandit Lal Mani v. Lala Gopal Sah*, 1945 (All.) 221). Suit cannot be brought by a person to whose share the pronote is allotted in a partition with the payee without an endorsement by the payee (*Virappa v. Mahadevappa*, 36 Bom. L. R. 807, 1934 (Bom.) 356); A Full Bench of Allahabad High Court has held that where a joint Hindu family was partitioned by means of a written arbitration award and promissory notes standing in the name of one member were allotted to the share of another, the latter could maintain a suit on the promissory notes so allotted, (*Rai Ram Kishore v. Ram Prashad*, 1952, All. 245; also see *Muthuveeraw Chetty v. Govindan Chetty*, (1961) 2 M. L. J. 470 F. B.) Other High Courts have also taken the view that a promissory note can be transferred as an actionable claim by means of an instrument in writing e.g., a sale-deed, and the transferee shall acquire the rights of the transferor. He shall be able to maintain an action on the promissory note, though he will not be a holder in due course. *Vaddadi v. Hanwra*, 1956, Andhra 9, *Venkatarama v. Krishna Swarup*, 1933, Mad. 133 (1) *Subbarayndu v. Subbarayndu*, 1935, Mad. 473, *Surat Chandra v. Kripanath*, 1934 Cal. 549, *Ghanshyam Das v. Ragho Sahu*, 1937, Pat. 100.

Alternative claims : In suit between immediate parties, it is advisable, if there is any doubt as to the validity of the bill or the note or as to the right of recovering upon it as such, to base the claim, in the alternative, on the original consideration. For example, when the stamp on a promissory note is not properly cancelled, or there are some material alterations in the note which might make it void under Sec. 87 or when sons of a Hindu executant are impleaded. But this alternative suit is permissible only when the promissory note was executed as a sort of

No. 108—Suit on a hundi (by an endorsee)

1. The defendant drew a *hundi* on January 10, 1958, addressed to the firm Lachmi Narain Panna Lal of Varanasi for Rs. 1,000, payable to defendant No. 2 or order, 21 days after date.

2. Defendant No. 2 endorsed the said *hundi* to the plaintiff.

3. As in para. 2 of the last precedent.

4. A notice of dishonour was sent by the plaintiff to the defendants by post on February 5, 1958, (Or, the defendant No. 1 had, before the maturity of the said *hundi*, countermanded payment, and was not therefore entitled to notice of dishonour. Such a notice was sent by post to the defendant No. 2 on February 5, 1958).

Prayer as in the last precedent.

conditional payment of the loan, or when it was executed as a security for the loan (*Bhushanbhadra v. Kanai Lal* 170 I. C. 758, 1937 Cal. 241; *Ramasamy v. Murugiah*, 161 I. C. 273, 1936 (Mad.) 179). Where, however, the contract is considered as contained wholly in the promissory note, Sec. 91 (b) Evidence Act will bar the proof of the loan independently of the promissory note; *Jacob and Co. v. A. P. Vicumsey*, 102 I. C. 138, 29 Bom. L. R. 432, *Perumal v. Kanakshi*, 1938 (Mad) 785, 177 I. C. 236, 1938 M. W. N. 722; see *Contra* (*Chinayya v Srinivasa*, 160 I. C. 1069, 43 L. W. 48), nor can the note be looked into to fix interest which can be awarded only under the Interest Act (*Anuplal Mehta v. Mahesh Jha*, 172 I. C. 744, 1937 (Pat.) 65, *Babulal v. Durga Prasad*, 1940 (Oudh) 308, 188 I. C. 184). Oudh Chief Court has, however, allowed it as compensation for deprivation of the use of money (*Ambika Singh v. Jagdeo*, 168 I. C. 927, 1937 (Oudh) 387). Therefore if an alternative claim on the loan is brought care should be taken to draft the plaint so as to keep clear of Sec. 91 (b), though the Courts are indulgent in the matter of allowing plaintiff to fall back on the original consideration and generally allow him to do so as far as possible (*Sarab Dial v. Nanda Mal*, 1936 (Pesh.) 143). When a promissory note is not taken in discharge of an oral contract of loan but is taken by way of collateral security as it will be presumed to have been so taken, S. 91 has no application. (*Lakshmi Devi v Mst. Aparna Devi*, 1951 A. L. J. 222). In a suit on the original consideration it is not necessary to mention in the plaint the fact of the execution of the pronote and of its being inadmissible for want of stamp (*Onkar Ballabh v. Girwar Lal*, 1936 A. M. L. J. 37). The Calcutta High Court has granted a decree on the original consideration even when the suit was on a pronote which was found to be inadmissible and held that it is not necessary to prove an independent promise to pay as the

No. 109—Suit on a promissory note

1. The defendant executed a promissory note on December 6, 1923, for Rs. 1,000, payable to the plaintiff on demand, with interest at 1 per cent per mensem.

2. The said note or any part of it has not been paid (or, the defendant has paid Rs. 200 on July 7, 1925, and has not paid any other sum towards the said note).

The plaintiff claims—

(1) Rs. as per account given below.

(2) Interest from date of suit to that of payment.

fact of loan implies a promise to repay it (*Mohatabuddin v. Mahomed*, 40 C. W. N. 473; *Indra Chandra v. Hirralal*, 40 C. W. N. 696, 1936 (3al.) 127). The Allahabad High Court in *Lakshmi Narayan v. Mst. Aparna Devi*, (1953 All. 535) following its earlier decisions in *Nazir Khan v. Ram Mohan* (1931 All. 183 F. B.), *Sheonath v. Sarjoo Lonia*, (1943 All. 220 F. B.), and *Major Mistri v. Bindu Devi* (1946 All. 126 F. B.) held that in case of a pronote and a simultaneous transaction of loan, if the pronote is inadmissible for some reason, suit will lie on the original loan, and the loan can be proved by oral evidence. Section 91 of the Evidence Act will not apply in such a case (*Lakshmi Devi v. Mst. Aparna*, supra; *Ram Gopal v. Tulshi Ram*, 1928 All. 641 F. B.). The Lahore High Court has, however, held that if the pronote is ruled out, no proof of loan can be allowed alicunde (*Bharapura v. Diwanchand*, 1940 (Lah.) 329, 190 I. C. 846). The Oudh Chief Court has held that if the fact of taking loan is mentioned in the plaint even without clearly raising an alternative claim, an alternative claim on the original consideration should be held to be made out (*Chandamal v. Mt. Krishna Kumari*, 1944 (Oudh) 273). An assignee to whom a *pronote*, and not the debt, has been assigned by endorsement cannot claim on the original consideration (*Kaliana v. Muthuswamy*, 50L. W. 797, 1940 (Mad.) 174; *Ramanathan v. Muthuraman* (1941) M. L. J. 816) and cannot therefore make others, e.g., sons etc., liable (*Viragavlum v. Chinna*, 1939 (Mad.) 856). But an indorsee cannot sue on the original consideration (*Maung Pho Mya v. A. H. Dawood*, 11 L. B. R. 137, 66 I. C. 584), nor is such an alternative claim possible where a pronote was executed in lieu of a previous pronote which is now barred by limitation (*Bhagwan v. Parag*, 9 O. W. N. 961). As to amendment of a claim on pronote so as to base it on original consideration, see Chap. IX. A suit on the original consideration independently of the pronote or Hundi is permissible provided there are no circumstances which keep intact the liability of the maker under the note (*Shri Krishna Jana v. Seeta Nath*, 1937 (Cal.) 753, 174 I. C. 340); and provided the plaintiff has not lost his right to enforce the Hundi (*Wallibhoy v. Jagjiwandas*, 1936 (Nag.) 260). But if the pronote is found to be forged, a claim on the original consideration cannot be permitted (*Ladburam v. Bansidhar*, 171 I. C. 881, 1937 (Pat) 572). It is not permissible for a beneficiary of a

No. 110—Suit on a promissory note and, in the alternative, on original consideration

1. On January 12, 1942, the defendant borrowed Rs. 500 from the plaintiff agreeing to repay it on demand with interest at 1 per cent per mensem. (Or, on January 12, 1924, the defendant made an account of the previous mutual dealings between the parties and found a balance of Rs. 500 due from him. The said accounts were stated by the defendant in writing and the balance was struck and signed by the said defendant in the plaintiff's *Khata Babi* at page 8).

Hundi to sue on the original consideration without impleading the *benamidar* holder (*Keshab Kumar v. Singai Moti Lal Kastur Chand*, 1949 Nag. 21).

Renewal of a negotiable instrument : When cause of action for money on a bill is once complete and the debtor then gives another bill to the creditor, the creditor, if the bill is not paid at maturity must always sue on the original bill provided that he has not indorsed, or lost, or parted with the second bill under circumstances making the debtor liable under it to a third person. The effect of giving a new instrument is not to discharge the old one (*Punjab National Bank v. Tajammul*, 100 I. C. 341, 25 A. L. J. 102; *Sheikh Akbar v. Sheikh Khan*, 7 C. 256 see also *Kshetra v. Harasukdas*, 102 I. C. 871, 45C. L. J. 233, 1927 (Cal.) 432).

Limitation : Three years from different dates in different cases (*vide* Arts. 21 and 41)

Defence : Besides any defect in the bill or note, want of due presentment or of notice of dishonour may be pleaded. It may be pleaded that the suit has been brought before maturity but the maker of a promissory note cannot deny its validity as originally made, and cannot, in a suit by a holder in due course, plead the incapacity of the payee to indorse the instrument. The acceptor cannot deny the payee's capacity or the authority of the drawer to draw or indorse the bill, though he may plead that it was not drawn by the person by whom it purports to have been drawn. An indorsee cannot in a suit, by a holder, deny the signature or the capacity of any prior party. The defence of want of consideration is admissible only as between parties who stand in immediate relationship with each other. In a suit by holder for consideration or his assignee the maker or the drawer cannot deny consideration of the note or bill (Sec. 43). But the fact that the consideration was of a different nature from that mentioned in the instrument is no defence (*Barhamdeo v. Karising*, 165 I. C. 809, 1936 (Pat.) 498; *Laksmanaswami v. Narasimha*, 1936 M. W. M. 437). Allahabad High Court has held that the protection of S. 43 is not open to an assignee under assignment made by a separate sale-deed and not by endorsement (*Jangbahadur v. Chanderbali*, 181 I. C 897, 939 (All.) 279). see *contra* 1962 Ker. L. J. 251. The defence of payment to endorser is not open to a maker in a suit by an

2. As a security for the aforesaid loan (or, balance on account stated), the defendant executed a promissory note on the aforesaid date, payable to the plaintiff on demand, with interest at 1 per cent per mensem.

3. Rs. 580 is now due to the plaintiff.

<i>Particulars</i>				Rs.
Principal	..	..	..	500
Interest from	January 12, 1924	to	May 12, 1925	80
Total				580

indorsee who had no knowledge of the alleged payment (*Anamalai v. Maung Saing*, 103 I. C. 139 5 Bur. L. J. 241; *Gopalan v. Lakshminarasamma*, 191 I. C. 40, 1940 (Mad.) 631), nor can the maker of a pronote when sued by an assignee of the note plead payment to the promisee, his remedy being against the promisee (*Alapati v. Vemuri*, 1948 (Mad.) 171, 1947 M. W. N. 502, 1947 2 M. L. J. 196). He is liable for negligence in not requiring the pronote for cancellation *Srinivas v. Karan Goverder* A I. R. 1966 Mad. 176. The defendant in a suit on a promissory note may show that it was given merely as a security for the plaintiff's share of the capital advanced towards a partnership and that the note can be enforced only when such capital becomes payable (*Sheo Prasad v. Govind Prasad*, 100 I. C. 352 49 A. 464). He cannot plead that there are accounts to be settled and that the amount would be given credit for in the final settlement of accounts between the parties (*Ghanshyam Das v. Mithan Lal*, 124 I. C. 763). He cannot plead that the plaintiff (Payee) was a benamidar for another (*Raghubir v. Ramashray*, 183 I. C. 60 1939 (Pat.) 347; *Ghanshyam v. Ragho*, 1937 (Pat) 100, *Reoti v. Manna*, 44 All. 290; *Raghubir v. Ramashray*, 1931 (Cal.) 387; *Subba v. Ramaswami*, 30 Mad. 88)

It has been held in Rangoon and Madras that a defendant cannot prove that the promissory note was given in repayment of an advance made by the plaintiff to a partnership capital and that the money due could not be claimed without going into the general accounts of partnership (*Maung Kyan v. Aruna Challam*, 5 R. 520; *Vallamkonnu v. Malupeddi*, 31 M. 342; *Kaluram v. Bhojraj*, 1938 A. M. L. J. 1) The defendant (maker) can plead that the pronote was not executed really in plaintiff's favour and that he has made payments to the person in whose favour he really meant to execute it (*Subba Narain v. Ramaswami*, 33 M. 88, 15 M. L. J. 508; *Madari Lal v. Lal Chand*, 100 I. C. 703 All.). Where defendant executed a pronote for Rs. 500 and it was understood between the parties that if a prior payment of Rs. 500 said to have been made by defendant could be traced in plaintiff's books the defendant would be exonerated of his liability under the pronote, the defendant was allowed to plead in a suit on the pronote that Rs. 500 had been subsequently traced (*Chunni Lal v. Hira Lal*, 26 A. L. J. 183). In a suit by an alleged owner of the consideration, the defendant can plead that he

The plaintiff claims—

- (1) Rs. 580, on the basis of the pronote.
- (2) Alternatively, the like sum, as money lent (or on account stated).
- (3) Interest from date of suit to that of payment at 1 per cent per mensem.

PARTNERSHIP (nn)

No. III—Suit for dissolution and account

1. On June 20, 1920 the plaintiff and the defendant entered into partnership in the business of commission agents and verbally agreed that the business should be run at Shamli under the name and style of Sada Sukh Ram Lal, that the plaintiff should do the selling and purchasing work and the defendant should do the account and correspondence work and should be in charge of the funds belonging to

is not bound to pay until the plaintiff obtains a discharge from the holder of the pronote (*Shri Krishna Jana v. Seeta Nath*, 41 C. W. N. 1283, 1937 Cal. 753, 174 I. C. 340, 66 C. L. J. 54)

The defendant may plead that some *material alterations* have been made in the negotiable instrument and therefore no suit can be brought upon it Sec. 87; (*Sundar v. Mabadeo*, 23 A. L. J. 253). The alteration must be in the body of the instrument and a forged endorsement of payment is not a material alteration (*Chanduketti v. Kunbi*, 163 I. C. 803, 1936 (Mad.) 616). In order that the alteration may be material, it must make a change as regards the rights and liabilities of the parties or their legal position. (*Nathu Lal v. Mt. Gomti Kuar*, 1940 (P. C.) 160; *Surendra v. Krishna*, 182 I. C. 615, 1939 (Cal.) 181; *Janardan v. Prandhan*, 5 C. L. T. 45). It must be by a party to the instrument or his representative and not by a stranger (*Krishna Charan v. Gaurochandro*, 1940 (Mad.) 61). It is not necessary that the alteration should be prejudicial to the person pleading it, e.g., when 3 persons are sued and one pleads that his signature is a forgery, the other can also take advantage of the plea and the suit should be dismissed even against the latter. (*Rangayya v. Sundara-Murty*, 1943 (Mad.) 511. If he is a minor he may plead that the instrument drawn by him is invalid. This plea will not be barred by Sec. 120. as Sec. 120 is subject to Sec. 26 (*Chengalaroya v. Nainappa*, 117 I. C. 133 Mad.).

(nn) A partnership contract is governed by the agreement on which it is entered into, and in the absence of any such agreement, by the provision of the Indian Partnership Act. That Act requires that all firms should be registered, and if a firm is not registered it cannot sue a third person nor can a partner sue the firm on the basis of any con-

the partnership and that both should contribute equally to the capital of the partnership and should share equally the profits and losses thereof.

2. The said partnership business has been carried on, on the said terms since the said date, but for some time past it has become impossible to carry on the business of the partnership except at a loss. (Or, the defendant has been guilty of gross misconduct in the affairs of the partnership. *Particulars* : The defendant, having the control of the partnership funds, has given loan of Rs. 2,000 out of them to his nephew Sada Ram, on March 20, 1924, at an interest of 6 per cent per annum, and in order to carry on the business of partnership, has borrowed, on March 20, 1924, Rs. 1,500 from the Allhabad Bank at 9 per cent per annum).

tract (S. 69), but a suit for dissolution and accounts can be brought by a partner (S. 69 (3) (a); *Shibba Mal v. Gulab Rai*, 1939 A. L. J. 964, 1939 (All.) 735). Suit by a partner against another for damages for mis-conduct can be filed as it falls within the exemption of Sec. 69 (3) (b) (*Nayinchandra vs. Moolchandra* A. I. R. 966 Bom. 111). The bar of Sec. 69 (3) applies to all proceedings including one U/s 8 (2) Arbitration Act (*Jagdish Chandra v. Kajoria Traders* A. I. R. 1966 S. C. 1300). After dissolution of the firm, however, any partner to whose share a debt has been allotted can sue to realize it (*Sanka v. Batter*, 1948 Mad. 441, 1948, 1 M. L. J. 394, 1948 M. W. N. 343). But though a decree "for accounts" by which a receiver could be appointed to take accounts can be granted, a decree "calling upon the defendant to render accounts" is not permissible (*Magan v. Ram Pratap*, 184 I. C. 160, 1939 (All. 535). Registration after institution of the suit cannot save the suit (*Firm Dnamal Purshotam v. Firm Babulal Chotelal*, 1936 All. 3; 1942 Mad. 252; *Prithvi Singh v. Hassan Ali*, 1951 Bom. 6; *Govind Lal v. Kunj Behari*, 1954 Bom 364; *Union of India v. Durga Dutt*, 1961 Ass. 2; *Kapur Chand v. Laxman*, 1952 Nag. 57). A suit dismissed on account of non-registration of the firm cannot be validated in appeal if the firm has been registered in the interval (*Jakiuddin v. Vithoba*, 1939 (Nag.) 301 186 I. C. 670). A suit in respect of a cause of action accrued before the Act is, however, saved by S. 74 (b), and can be brought even by an unregistered firm (*Narmada Ginning Factory v. Kastoormal*, 19 N L. J. 262; *Hiralal v. Amarchand*, 1940 (Nag.) 137, 190 I. C. 245). *Revappa v. Babu Sidappa* 179 I. C. 832, 1939 (Bom.) 61; *Lokramdas v. Tharumal*, 184 I. C. 88, 1939 (Sind) 206). A contrary view has been taken in *Ajmer & Patna (Lachmi Narain v. Sheo Dan Mal* 1936 A. M. L. J. 20; *Shahzad Khan v. Darbar B. Kuebbi*, 17 Pat. L. T. 7), where S. 74 (b) is held applicable to pending suits only; but this is not, it is submitted, meant by the words of S. 74 (b). Where the firm could not sue, a trans-

The plaintiff claims—

- (1) Dissolution of the partnership.
- (2) that accounts be taken, and
- (3) that a receiver be appointed.

No. 112—Suit for dissolution of partnership

(Form No. 49, Appendix A, C. P. C.)

1. He and C. D., the defendant, have been for years (*or* months) past carrying on business together under articles of partnership in writing, (*or* under a deed, *or* under a verbal agreement).

feree from that firm also could not (*Kaniram v. Paramananda*, 191 I. C. 39 1940 (Cal.) 528). But if an unregistered firm is sued and decree is passed it can appeal against that decree, (*A.V. Sundaram v. T.O. Ithamthn*, 1945 (Mad.) 209). A partnership may be dissolved by the parties themselves, or by the court. A partnership at will may be dissolved by any partner by notice to the others (S. 43); but if the assistance of the court is required for dissolution a suit may be brought in court after the notice (*Tajammul Husain v. Ahmad Ali*, 13 Luck 219, 1937 (Oudh) 438, 167 I. C. 83.). A suit for dissolution of partnership can be brought on any of the grounds mentioned in Sec 44. Even a partnership entered into for a fixed term can be dissolved if the partners have lost confidence in each other (*Tulsi Ram v. Dina Nath*, 1926 (Lah.) 145, 89 I. C. 333). But neglect of one partner alone to further the partnership business is no ground for dissolution (*Chumalal v. Sheoharan*, 1925 (All.) 78). **The grounds should be specifically stated in the plaint, as also the terms of the partnership, if profits are claimed.** Accounts may be demanded, and, if necessary, a prayer for appointment of a receiver may be made. If the partnership has been dissolved by the parties themselves, a suit for account only may be brought and the mere fact that account books are in the possession of the plaintiff himself does not debar him from bringing a suit (*Dogar Singh v. Mst. Parbati*, 161 I. C. 669, 1936 Lah.) 146). A plaintiff may pray for winding up the partnership on an allegation of dissolution, or for dissolution by court, in the alternative. **The shares of the partners must be alleged in all suits in which an account is claimed.** It is not necessary to allege any other terms of the partnership except those on which the suit is based, e.g., if dissolution is claimed on the breach of any term by the defendant, the term must be alleged. A suit for account by one partner against another without a prayer for dissolution does not lie unless it seeks the discharge of an obligation undertaken by the defendant under the partnership contract, e.g., to render accounts annually (*Binjrarj v. Kison Lal*, 1933 (Nag.) 127, 141 I. C. 277). When it is necessary to go into the accounts before giving the plaintiff an effective relief, the court may pass a preliminary decree before passing a final decree (O. 20 R. 15). If after preliminary decree no action is taken by the court the

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. (Or the defendant has committed the following breaches of the partnership articles :—

(1)

(2)

(3)

plaintiff may at any time apply for further action and for passing a final decree. Such an application is not governed by any rule of limitation (*Ramanatha v. Alagappa*, 53 M. 378). As the forms of preliminary and final decrees given in the C. P. C (forms Nos. 21, 22, Appendix D) would show, a court is bound to give all necessary instructions for the winding of the partnership, and to adjust all accounts between the parties, and to make any of them liable to pay to another any sum found due. It is not, therefore necessary to claim any specific sum from any of the defendants. If there are no outstanding debts to be realized or no partnership property to be turned into money, the appointment of a receiver need not be asked for. **If dissolution prior to suit is alleged, its date and as to how it came about must be alleged.** If accounts have also been settled, then the plaintiff may sue for the amount for which the defendant has made himself liable to the plaintiff under the settled account. **In that case the settlement of the account must be specifically alleged** with particulars.

All the partners should be made parties to a suit for dissolution, and, if a partner is dead, all his heirs must be impleaded. A suit for account by some of the heirs of a partner without impleading the other heirs is bad and the defect cannot be cured after limitation (*Syed Abdul Hawak v. Tumulari*, 100 I. C. 616, 52 M. L. J 318 1927 (Mad.) 491). In an Allahabad case, however, it was held, that other partners could be added as *pro forma* defendants even after limitation (*Jamna Kuer v. Kunj Behari*, 1937 (All.) 502, 170 I. C. 743, 1937 A. W. R. 527). If the manager alone of a joint family is a partner, it is not necessary to implead the junior members (*Manohar v. Ram Richpal*, 125 I. C. 628 Lah.) nor can a junior member sue for dissolution, but if on dissolution the manager makes an arrangement which is prejudicial of the interest of the family he can sue to recover the manager's share in the assets (*Venkataraman v. Varabalu*, 50 L. W. 681, 1939 M. W N. 1028). A suit for account or balance due cannot be brought when all partners of the plaintiff firm are also members of the defendant firm; in such a case the proper remedy is a suit for partnership account of the defendant firm (*Pokhar Das v. Sewa Ram*, 125 I. C. 801, 1929 (Sindh) 192). Individual partners cannot sue for their shares of any separate part of the partnership assets until the accounts are completely settled (*Sonunram Mukhi v. Sewaram*, 178 I. C. 53, 1938 (Lah.) 259).

No. 113—Suit for winding up a partnership

1. On June 20, 1920, the plaintiff and the defendant entered into partnership in the business of commission agents and verbally agreed that the business should be run at Shamli under the name and style of Sada Sukh Ram Lal that the plaintiff should do the selling and purchasing work, and the defendant should do the account and correspondence work and should be in charge of the funds belonging to the partnership and that both should contribute equally to the capital of the partnership business and should share equally the profits and losses thereof.

2. The said partnership was, by mutual verbal agreement, dissolved on November 5, 1924.

The plaintiff claims—

- (1) That an account of the partnership be taken.
- (2) That a receiver be appointed.

The question as to who used to keep the accounts or the funds of the partnership, and in whose custody the account-books are, should be considered after the passing of a preliminary decree. The procedure which should be followed for the settlement of accounts is described in *Thirukumaresan v. Subbaraya*, 20 M. 313. Accounts should be taken from the beginning unless it is shown that there was a settlement at a later stage (*Shawal v. Tansukhdas*, 125 I. C. 721, 33 C. W. N. 1101, 1930 (Cal.) 154). Ordinarily the suit should be for general accounts, and in the absence of special circumstances, a claim for partial accounts will not be entertained (*Lachmichand v. Jagoolal*, 166 I. C. 953, 1937 (Pat.) 55).

Before a dissolution takes place, or unless a dissolution is also claimed, no partner has a right to call for accounts from another partner (*Seth Kassamal v. Gopi*, 9 A 120), nor can a partner discharging a partnership debts sue for contribution (*Shidlingappa v. Shankarappa*, 28 B. 176). But in respect of any matter which can be determined without going into partnership accounts, a suit may be brought in the ordinary way, e. g., for defendant's share of capital or for an injunction to restrain waste of partnership property.

The cumulative effect of all the circumstances should be considered in arriving at the conclusion whether a partnership is real or not.

A partnership may be dissolved by the agreement of the partners. It is not necessary in every case that the fact of dissolution should be evidenced by a document but the dissolution of the partnership may be inferred from the circumstances of the case and the conduct of parties. (*Kaniram Ganpat Rai v. Commr. of I. T. Bihar & Orissa*, 1953 (I. T. R.) 314 (Pat.) D. B.).

No. 114—Suit for winding up on the allegation of dissolution or, in the alternative, for dissolution

Paras 1 and 2, as in last precedent.

3. It has become impossible to carry on the partnership business except at a loss.

The plaintiff claims—

(1) A declaration that the partnership was dissolved on November 15, 1924 or,

(2) In the alternative, that the partnership be dissolved by decree of the Court.

(3) and (4) as (1) and (2) in the last precedent..

The court has jurisdiction to grant such relief if the necessary facts are found and it is immaterial that the plaintiff has not asked for the relief u/s 37 in his plaint (*Ram Narian v. Kashi Nath*, 1953 B. L. J. R. 289 (D. B.)).

A plaintiff suing for dissolution of a partnership which under the terms of the agreement of the partners is for a fixed term, which has not yet expired, must make out a very strong case for dissolution before any relief could be granted in violation of the terms of agreement. (*Mani Lal Bechar Lal v. Kheslabji*, 6 D. L. R.(Pat.) 140).

A suit for money due to partnership by one of the partners alone in his name, is not maintainable (*Chhotey Lal Ratan v. Rajmal*, 1951 Nag. 448).

An agreement of partnership need not be express and can arise out of mutual understanding evidenced by a consistent course of conduct and by express admission of the points (*Chhotey Lal Ratan v. Rajmal*, 1951 Nag. 448).

Court-fee is calculated on the amount at which the plaintiff values his suit.

Limitation : A suit for dissolution was under the Act of 1908 governed by Art. 120 and not by Art. 106 which applied to a suit for account *after* dissolution (*Khorasany v. C. Acha*, 6 R. 198, 110 I. C. 349, 1928 Rang. 160; *Srinivasalu v. Rama Krishna*, 1933 M. W. N. 689, 1933 Mad. 353, 144 I. C. 573). Under the Act of 1963, Art. 113 and not Art. 5 will apply.

A suit by an expelled partner for accounts or for dissolution and a share in profits was governed by Art. 120 and not Art. 106 (*Din Mohomed v. Kashi Ram*, 120 I. C. 613 Lah.), so also a suit for account based on an agreement to render accounts and distribute property annually (*Binraj v. Kisanlal*, 1933 (Nag.) 127, 141 I. C. 277).

Defence : To a suit for dissolution of a partnership at will, the defendant can hardly have any defence; but if dissolution is claimed on any other ground, e.g., misconduct of the defendant or breach of any term of partnership, the same may be denied. He may plead that the

PLEDGE (oo)

No. 115—Suit by a pawnee for money and sale of pledged property

1. On January 20, 1924 the defendant borrowed Rs. 1,500 from the plaintiff, and in consideration of the said loan executed a promote payable on demand and carrying interest at 9 per cent per annum. As a collateral security for the said loan, the defendant pledged the jewels detailed at the foot of the plaint to the plaintiff.

2. The defendant has not repaid the said loan or any part thereof.

partnership has already been dissolved by mutual agreement. The shares alleged by the plaintiff may be disputed. If a suit is brought for winding up the partnership, the defendant may plead that it has not yet been dissolved, or he may admit the dissolution and plead that accounts were also settled and squared up at the time of such dissolution. It is premature to set up, before the passing of a preliminary decree, any objections about the accounts, e.g., that the plaintiff has realized all the assets.

(oo) Under Sec. 176, Contract Act a pawnee can either himself sell the goods pledged and sue for any balance remaining due to him, or he can sue upon the debt, retaining the goods as collateral security. But this does not, it is submitted, mean that he can bring a suit for money without making any mention of the pledge, for, if he were allowed to do so, he could execute the decree against the person or other property of the debtor, retaining the pledge and this would be very hard on the debtor. It has even been held that a pawnee cannot maintain the suit for his debt unless he is in a position to produce the goods pawned on payment or to account for the same. (*Trustees v. Dixon Johnson*, 1926 A. C. 489; *Rahmat Ali Fateh Ali v. Calcutta National Bank*, 1962 A. L. J. 324 Also see *Lalla v. Rahmat Ali* I. R. 1967 S.C. 18. The court will generally give a direction for satisfaction of the decree by sale of the goods pledged and for execution against other property only for the balance. The general practice is to bring suit for sale in the form adopted in the above precedent. The same forms appear to have been adopted in the cases *Madaan Mohan v. Kanai*, 17 A. 284 and *Mahalinga v. Ganpathi*, 27 M. 528 (though the relief may as well be worded as within brackets). If the pawnee wants to exercise the option of private sale, he must give reasonable notice of his intention to the debtor though it is not necessary that date and time of sale should be communicated by the notice (*Kunj Behari v. Bhargava Commercial Bank*, 45 I. C. 462, 40 A. 522, 16 A. L. J. 390). Such notice cannot be dispensed with even by contract (*Co-operative Hindustan Bank v. Surendra*, 1932 (Cal.) 524, 138 I. C. 852, 59 C. 667). If no notice is given pledger can bring a suit for redemption against vendee even if he is an innocent

The plaintiff prays (1) that a decree for Rs. 1,500 principal and Rs. 405 interest, with further interest after the date of suit be passed, and,

(2) that the said jewels be ordered to be sold and the proceeds be applied to the satisfaction of the decree.

[Or, The plaintiff prays (1) that the said jewels be ordered to be sold and the plaintiff's claim for Rs. 1,500 principal and Rs. 405 interest with further interest after the date of suit be satisfied out of the sale proceeds; and,

(2) that should the sale proceeds prove insufficient to satisfy the plaintiff's said claim, the plaintiff be given a personal decree against the defendant for the balance.]

No. 116—Another suit after private sale of the property

1. Same as in the last precedent.

2. On March 4, 1926, the plaintiff sent notice to the defendant by registered post demanding the money due to him within 15 days and intimating that, in case of default of payment, the plaintiff would sell the pledged property.

3. The defendant did not pay the amount due to the plaintiff or any part thereof.

purchaser without notice of pledge (*Official assignee v. Madholal*, 1947 Bom. 217, 48 Bom. L. R. 8218). No notice of adjourned date of sale is necessary (*ibid*). A pledger cannot compel the pawnee to exercise the power of sale as a means of satisfying the decree which the latter has obtained (*Ramaswamy v. Palaniappa*, 30 L. W. 898). The pawnee is not put to exercise his judgment at his peril as to when is the proper and reasonable time for him to sell, as considerations applicable to an unpaid seller and buyer are not applicable in his case (*Mannargudi v. Ramaswami*, 1929 M. W. N. 167). **In such a case, he should allege a demand for the amount due, unless the same was payable at a fixed time, a default by the pledger, a notice of sale, an actual sale and the fact that the sale proceeds were insufficient to satisfy the claim** (*Alliance Bank v. Ghammandi Lal*, 101 I. C. 725, 8 Lah. 373). Where no time is fixed for payment reasonable notice of demand should be given and right of sale will accrue when the demand is not complied with (*Motilal v. Lakshmi Chand*, 1943 (Nag.) 162; *Ram Dalay v. Sayyad*, 144 (Pat.) 135).

Limitation for a suit to recover the debt is three years provided by Art. 19. The collateral security of pledge does not make any difference.

4. The plaintiff sold the said pledged property through Ram Lal goldsmith, on March 20, 1926, and realized Rs. 1,050 from the sale. Rs 752-9-0 is still due as per account given below.

The plaintiff claims Rs. 752-9-0 with interest from date of suit to that of payment.

RAILWAYS AND CARRIERS (pp)

No. 117—Suit against a carrier, not being a common carrier, for injury to goods

1. By a verbal agreement entered into between the plaintiff and the defendant on March 15, 1925, the defendant undertook to carry carefully by a motor lorry the plaintiff's goods detailed at the foot of the plaint from Saharanpur to Dehra Dun and there deliver the said goods to the order of the plaintiff.

But limitation for a suit for sale was six years as provided by Art. 120 of the Act of 1908 (*Madan Mohan v. Kanhai*, *Mabalinga v. Ganga*, *supra*) but will now be 3 years under Art. 113 of the Act of 1963. If a creditor exercises his right of private sale, his suit for recovery of balance was to be brought within the original three years provided by art. 57 and no new cause of action arose from the sale (*Yellappa v. Desayappa*, 30 B. 218, 7 Bom. L. R. 739, *Saiyid Ali v. Debi Pd.* 24 A. 251, 1902 A. W. N. 43). The position will be the same under Art. 19 of the new Act. Even if the agreement is that the pawnee should sell the goods pledged and the pawnee should realize his debt out of the sale proceeds, the pawnee's suit for recovery of the debt or any balance should, it was held, be brought within three years provided by Art. 57, (now Art. 19) and the right to recover the debt cannot be held to be suspended till the goods are sold (*Debi Din v. Gaya Pd.*, 109 I. C. 64).

(pp) Carrier is a person who undertakes to transport the goods of another from one place to another. The term "**Common carrier**" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately (Sec. 2 Carriers Act). But a motor bus service intended for transport of passengers and their luggage only cannot be deemed to be a common carrier for parcels (*Maddappa v. Firm of Ramiab etc.*, 17 Mys. L. J. 284). A Motor Transport Co. (*Vakil & Co. v. Mahanarain*, 1937 A. M. L. J. 56) and a Steam Navigation Co. are examples of common carriers but a carrier by sea is not a common carrier. Whereas a porter or cart-man is governed by contract, the liabilities of a common carrier are governed by the provisions of Act III of 1865. Railways in India are owned either by the Govern-

2. On March 16, 1925, the defendant received the said goods for the purpose and on the terms aforesaid, but did not carefully carry the said goods.

3. The said goods were broken and damaged, whilst being carried upon the said journey, by the negligence and want of care of the defendant.

Particulars of negligence and want of Care

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Particulars of damage

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The plaintiff claims Rs. 400, with interest from date of suit to that of payment.

ment or by a private company. Company owned or managed Railways can, therefore, come within the meaning of "common carrier" as regards goods which they profess to carry or actually carry for passengers generally. But the Indian Railways Act (IX of 1890) generally governs the liabilities of all railways, whether owned by the State or by private companies.

In a suit against an ordinary carrier, the contract, with all its terms, has to be alleged in the plaint which is framed like a plaint in a suit against a person for breach of any other contract. In a suit for damage resulting from the carrier's negligence, the onus of proving negligence will be upon the plaintiff, if the carrier has taken care of the goods as required by Sec. 151, Contract Act. In a suit against a common carrier, facts showing that the defendant is liable under the Carriers' Act should be alleged in the plaint, and the suit should be brought subject to that Act as to notice, etc. In a suit for loss, damage or non-delivery of goods entrusted to a common carrier it is not for the plaintiff to prove negligence of defendant (Sec. 9, Carriers' Act) therefore the same need not be alleged in the plaint. It will be for the defendant to show diligence and to explain the loss, etc. A common carrier can limit his common law liability by special contract (Sec. 6) but liability for negligence being a criminal Act cannot be curtailed (Sec. 8) (*Murlidhar Mohanlal v. River Steam Navigation Co.* A. I. R. 1967 Assam 74). Where goods are consigned to a place beyond the scope of a carrier's business so that from that point he must forward them by another carrier, the carrier is responsible for the goods for the whole journey, unless he limits his liability by a specific agreement (*India General Navigation Co. v. Girdharilal*, 100 I. C. 903, 31 C. W. N. 359, 1927 (Cal.) 394). No claim in respect of certain specified classes of goods can be made, if the value of the goods is worth over Rs. 100 unless the value and description thereof has been declared before hand (Sec. 3). A notice under Sec. 10, Carriers' Act has to be given but it may be served on any local representative of the carrier, there being no special rule on whom it should be served (*India General Navigation v.*

**No. 118—Suit against common carrier for damages
for delay in delivery of goods**

1. The defendants are common carriers of goods by steamer from Ghazipur to Bhagalpur.

2. On June 4, 1925, the plaintiff delivered to the defendants one parcel of butter to be conveyed by them as such common carriers from Ghazipur to Bhagalpur and there delivered to the plaintiff within a reasonable time.

3. The defendants failed to deliver the said parcel within a reasonable time, but delivered the same two days after the time when it ought to have been delivered, and when the butter had become stale and worthless.

Particulars of damage

20 lbs. of butter at 1-8 per lb.—Rs. 30.

The plaintiff claims Rs. 30, with interest from date of suit to that of payment.

Girdharilal, supra) but it is not necessary to plead the giving of this notice in the plaint (*U Ba Tin v. U Tun On*, 1938 (Rang.) 437).

Suits against Railways may be brought in respect of goods, luggage or passengers. The responsibility of all Railways (whether owned by the State or by a company), as carriers, for loss, destruction or deterioration of goods or animals is governed, not by the Carriers Act, but by Chapter VII of the Railways Act, which should be carefully studied before drafting a plaint against a railway administration. **Facts showing the liability under the provisions of that chapter should be alleged in the plaint**

Notice under S. 56 is intended to safeguard the position of the Railway, when it seeks to sell the goods as not claimed.

Failure on the part of the Railway to issue notice under S. 56 if the owner is known does not entail any liability, when the goods are still in its possession ready for delivery on demand and on payment of dues. The owner has no right to any damages in the said circumstances (*Panna Lal v. E. I. Rly. Administration*, 1952 A. L. J. 657).

If the Railway Administration had no knowledge of the fact that the goods consigned were deteriorating as a result of delay on their part in delivering the consignment, the question of their failure to convey information of the deteriorating condition of the goods to the consignor or the consignee is not want of such care as would make them liable, assuming that conveying of such information is an obligation upon them (*Chauthmal Agarwala v. The Union of India*, A. I.R. 1951 Assam 140).

The Railway Accidents (compensation) Rules, 1950 made under S.

No. 119—Suit against a common carrier for loss of and injury to goods

1. The defendants are common carriers of goods from Rawalpindi to Srinagar.

2. On May 4, 1925, the plaintiff delivered to the defendants four cases containing crockery to be conveyed by them as such common carriers from Rawalpindi to Srinagar and delivered to the plaintiff.

3. The defendants only delivered three cases of crockery to the plaintiff at Srinagar, and one of the said three cases was delivered in a broken and totally worthless condition.

Particulars of damages

Value of one case of crockery not delivered by the defendant, as per details given below—Rs. 800.

82-J of the Railways Acts, clearly work out the object of S. 82 and are in no way inconsistent with the meaning of S. 82, nor do they go beyond the object of that section. They cannot, therefore, be held to be invalid and inoperative (*Shreenath Singh v. East Indian Railway*, A. I. R. 1952 Pat. 466).

Law prior to Amendment of the Railways Act by Act 39 of 1961 : Ordinarily, the liability of the Railway is that of a bailee, and therefore in a suit for loss, destruction or deterioration of goods, the fact of such loss etc., is sufficient to raise a presumption of negligence on the part of the Railway and the burden is shifted on to the latter to prove that they had taken the amount of care required by Sec. 151, Contract Act. It is for the Railway to prove that circumstances existed which exonerated them from liability for the loss or non-delivery. (Sec. 72, Railways Act; *Firm Gaurimal v. Secretary of State*, 1926 (Lah.) 217, 91 I. C. 963; *Hirji Khetsey v. B. B. & C. I. Ry.*, 25 I. C. 241, 39 B. 191, 16 Bom. L. R. 467; *Nanku v. I. M. Ry.*, 22 A. 361, A. W. N. (1900) 111 *Trustess of the Harbour Madras v. Best and Co.*, 22 M. 524; *Surendralal v. Secretary of State*, 25 C. L. J. 37, 38 I. C. 702; *Baroda v. A. B. Ry.*, 43 C. L. J. 211, 91 I. C. 1021; *Governor-General v. Kabir Ram*, 194 Pat. 345; *Gov. Gen. in Council v. G. S. Mills Ltd*, A. I. R. 1951 Pat. 382, *Manohar Lal Gokul Prasad v. G. G. in Council*, 1950 A. L. J. 881). It is therefore, not necessary for the plaintiff to allege in the plaint how the loss or deterioration occurred (*Nanku Ram v. I. M. Railway*, 22 A. 361).

But under Section 76 it is not necessary for the Railway to prove that it is not possible that the loss was due to the negligence or misconduct of its servants (*Kishendas Purnanomal v. Secretary of State*, 168 I. C. 76, 1937 (Sind.) 85). If destruction of goods is caused by fire, the Railway is not responsible and is not bound to prove the origin of the fire or that

Value of the crockery broken as per details given below—
Rs. 600.

The plaintiff claims Rs. 1,400 and interest from date of suit to that of payment.

No. 120—Suit against Railway for delay in delivery

1. On July 18, 1958, the plaintiff's agent at Calcutta delivered 100 bags containing 250 mds. of Java sugar, to the servants of the defendant at Howrah, for despatch by goods train to Jumna Bridge Station for delivery to the plaintiff, on receiving the freight, and obtained R. R. No. 2341. The goods were booked at railway risk rates.

the Railway Company itself were free from any negligence in the matter (*Moolchand v. G. I. P. Ry.*, 102 I. C. 433).

When a Railway Administration undertakes to convey goods to a particular place and give delivery there and the goods are lost due to some fault of the Railway, the damages which the plaintiff is entitled to claim is the price of the goods at the place of their destination (*Dominion of India v. Chhagan Lal Premji*, 1951 N. L. J. 470).

The Railway Administration is not bound in law to give open delivery on the demand of a party and so any delay in obtaining open delivery according to the wishes of that party cannot make the Railway Administration liable for any loss on account of any fall in the market price of the goods (*Governor General-in-Council v. Badri Dass*, A. I. R. 1951 Allahabad 702).

But if goods are consigned under any special agreement, facts should be alleged showing the liability of the Railway under the terms of that agreement.

Law after the amendment : The responsibility of railway administration as carriers is now governed by sections 73 to 79 of Chapter VII of the Railways Act. These provisions must, therefore, be carefully studied before pleadings are drafted in cases relating to the liability of railways for carriage of goods and animals. The following points must be particularly borne in mind :

(1) Risk notes having been abolished all booking is now done either at railway risk rates or at owner's risk rates. If at the time of the booking the sender or his agent does not elect in writing to pay at the railway risk rates, the animals or goods shall be deemed to have been tendered to be carried at owner's risk rates.

(2) Generally the railway administration is responsible for loss, destruction, damage, deterioration and non-delivery in transit of animals or goods delivered to it arising from all causes except those specifically mentioned in section 73, but even if any of the cause mentioned in S. 73 are responsible for the loss etc, the railway has to prove that it had

2. The usual and reasonable period of transit by goods train from Howrah to Jumna Bridge is eight days.

3. The defendant negligently delayed the consignment in transit, and actually delivered it to the plaintiff on September 25, 1959.

4. In consequence of negligence of the defendant the goods lost in value by a fall in the market price, and thus damage was caused to the plaintiff.

Particulars of damages

Difference between the price in the last week of June (*i.e.*, Rs. 16 per maund) and on September 25, (*i.e.*, Rs. 14 per maund), at Rs. 2 per maund—Rs. 500.

used reasonable fore-sight and care in the carriage of the animals or goods.

(3) In respect of animals or goods booked at owner's risk rates there is no responsibility for any loss etc. in transit unless the cause is negligence or mis-conduct on the part of the railway administration or any of its servants. Special considerations however, apply in respect of non delivery or pilferage in transit of goods carried at owner's risk rates. In such cases the railway administration is bound to disclose how the consignment or package was dealt with throughout the time it was in its possession or control. Such disclosure may lead to an inference of negligence or mis-conduct. If it does not, the consignor will have to prove that there was negligence or misconduct. This rule will, however, apply only if the non delivery is of whole of the consignment or the whole of some package or packages forming part of a consignment. The cases of pilferage to which the rule will apply must fulfill two conditions (1) They must be in respect of a consignment or package which was so covered or protected that the covering or protection was not easily removable by hand and (2) on or before delivery, the pilferage in transit had been pointed out.

(4) The general responsibility of the railway in respect of animals and goods booked whether at railway risk or at owner's risk can arise at 3 stages, *i.e.*, during transit, at the time of delivery and after transit (Transit includes period allowed for unloading and removal).

(a) In respect of loss etc. during transit if it is due to delay or detention the railway is responsible unless it is able to prove that the delay or detention arose without negligence or mis-conduct on its part or that of its servants. The Railway is, however, not responsible for loss etc. caused by deviation of route if it was beyond the control of the railway or due to congestion in the yard or other operational reasons.

(b) The Railway is not responsible for wrong delivery provided it acts in good faith and delivers to a person who produces the original railway receipt. It is also not responsible for any loss etc. which has

The plaintiff claims Rs. 500 as damages, with interest from date of suit to that of payment.

No. 121—Suit for non-delivery of goods

1. On May 12, 1925, the plaintiff's agent Ramlal handed over 200 bags of wheat to the servants of the defendant at the Gorakhpur station for despatch to Bhagalpur and for delivery to the plaintiff on receipt of freight. The defendant's servant accepted the said goods and gave to the said Ramlal Railway Receipt No. 561 for the same. The goods are booked at owners risk rates.

2. Out of the said 200 bags, the defendant's servants at Bhagalpur delivered only 160 bags to the plaintiff on May 18, 1925, and have not delivered the remaining 40 bags upto this time.

3. The plaintiff has suffered damage by the non-delivery of the said 40 bags, which was due to the misconduct and negligence of the defendants servants.

Particulars : Price of 80 maunds of wheat in 40 bags, at Bhagalpur on May 18, 1925, when it ought to have been delivered, at Rs. 6 per maund .. Rs. 480

Price of 40 empty bags at 8 annas per bag Rs. 20

occurred after the wagon containing the goods has been placed at the point of inter-change between the railway administration and the owner of the siding and the owner has been informed of the fact.

(e) In respect of loss etc. after transit the railway has the ordinary responsibility of a bailee upto a period of 30 days and has no responsibility after that period. This rule has two exceptions :

1. For goods carried at owner's risk the responsibility is limited only to cases when negligence or mis-conduct is proved.

2. For goods of the kind mentioned in the second schedule of the Railways Act there is no responsibility at all after the transit is over.

(5) There are special provisions in section 77A and 77B and 78A in respect of animals and articles of special nature and in section 77C for damage, deterioration etc. etc of goods in defective condition defectively packed.

(6) The railway is exonerated from all responsibility if the loss etc. is due to any of the causes mentioned in section 78.

The plaintiff claims Rs. 500, with interest from the date of suit to that of payment.

No. 122—Suit for non-delivery of goods

1. On July 10, 1958, the plaintiff handed over 200 bags of sugar each containing 2 maunds to the servants of the defendant at Pilibhit, for despatch to Muzaffarnagar and for delivery there to the plaintiff or his order.

2. The servants of defendant accepted the consignment for the aforesaid purpose on the plaintiff executing a forwarding note and on the plaintiff paying the Railway freight, and granted Railway Receipt No. 789 to the plaintiff. The goods were booked at owners risk rates.

3. When the consignment arrived at Muzaffarnagar, it was found short by 72 bags, and the servants of defendant gave delivery of the remaining bags to the plaintiff's agent.

4. The loss of the said 72 bags was due to the misconduct of the servants of defendant.

Particulars : The doors of the wagon in which the 200 bags were loaded at Bareilly and in which they were brought direct to Muzaffarnagar were not properly fastened and sealed. While the said wagon was standing at Moradabad Junction station in the night the said 72 bags were taken out through the door on the off side of the platform by Shamsheer and Jehangir Jamadars employed by defendant at Moradabad station, with the help of other persons.

If particulars are not known, say

5. The loss of the said 72 bags was due to misconduct of the servants of the defendant. The plaintiff is at present unable to give particulars of the said misconduct.

Whether the goods or animals were booked at railway risk or owners risk must be clearly alleged in the pleadings. Where the railway is responsible only if the negligence or misconduct of its administration or of its servants is proved, allegations of negligence and misconduct must be made and particulars thereof given. Where, however, it is for the railway to escape liability on the ground that there was no negligence or misconduct its pleas need not be anticipated. The stage

6. The plaintiff has suffered damage by the non-delivery of 72 bags of sugar.

<i>Particulars</i> : Price of 144 maunds of sugar at Rs.		20
per maund	.. .. .	Rs. 2880
Price of 72 gunny bags at 6 annas per Bag		Rs. 27
Total		Rs. 2,907

7. Notice of the claim as required by Sec. 80, C. P. C. has been served on the General Manager of the Northern Railway by registered post, on September 20, 1958.

The plaintiff claims Rs. 2,907 and interest from date of suit to that of payment.

No. 123—Suit for damage to goods while in transit

1 and 2, same as in the last precedent.

3. When the consignment was delivered to the plaintiff's agent at Muzaffarnagar, all the bags were found in a drenched condition and the sugar considerably damaged by water and the plaintiff has suffered damage thereby.

at which loss etc. occurred and if compensation can be recovered only in special circumstances, those circumstances must be alleged.

Who can sue? A suit against a carrier or Railway for the loss of goods, or for any breach of duty or of contract is, as a general rule, to be brought by the person in whom vests the property in the goods (*Murphy v. Midland Railway*, (1903) 2 I. R. 5, 23, 30; *Dani Chand v. Bhawalka Bros.* A. I. R. 1955 S. C. 182.). A Railway receipt was held to be a document of title by S. C. in the case of *Commission of I. T. v Bhopal Textile Ltd.* A. I. R. 1961 S. C. 426. The question of a valid pledge of goods by transfer of documents of bill was considered by S.C. in *Mosir Merkantile Bank v. Union of India* A. I. R. 1965 S. C. 1954. As between seller and purchaser, the property passes to latter on the seller's delivery to the carrier, who carries the goods as bailee for the purchaser, and the seller in employing the carrier is to be regarded as agent for the purchaser (*Daves v. Peek*, (1799) 8 T. R. 330). In such cases, consignee should bring the suit. When, however, property does not pass to the consignee, as in cases of goods sent on approval, the consignor alone can bring the suit (*Swain v. Shepherd*, (1832) M. and Robb 223), so also where the consignor has to carry or procure at his own expense the carriage of the goods (*G. W. Railway Co. v. Bagg*, (1885) 15 Q. B. D. 625). When the seller books the consignment "to self" the property does not pass to the buyer and the buyer cannot

Particulars : Difference between the market value of sugar of the quality of the plaintiff's sugar at Muzaffarnagar on the date of delivery (Rs. 20 per maund), and the value which the damaged sugar fetched (Rs. 13 per maund), at Rs. 7 per maund on 400 maunds—Rs. 2,800;

4. The said damage to the goods was caused by misconduct of the servants of defendant.

Particulars : The servants of defendant employed at Bareilly station loaded the goods during the rainy season in a wagon, the roof of which was damaged to the knowledge of the said servants. During the course of journey, the rain water came into the wagon and drenched all the bags of sugar. The servants of the defendant at the junction stations at Moradabad and Hapur saw this but did not arrange to have the goods transferred to another wagon.

5. Same as No. 6 of the last precedent.

The plaintiff claims Rs. 2,800 and interest from date of suit to that of payment.

sue, but if the railway receipt is handed over to the buyer *on the taking price* this operates as transfer of the right (*G. G. in Council v. Joy Narain*, 1948 Pat. 36).

A Full Bench of Allahabad High Court has held that a consignee who is not the owner of the goods but to whom goods are consigned for sale on commission basis can sue for loss caused to the goods in transit. (*Dominion of India v. Gaya Pershad*, 1956, All. 338). The Bombay High Court is of the opinion that a consignee cannot sue unless title has passed to him. (*Chaganmal Harpal Das v. Dominion of India*, 1957 Bom. 276). In such a case the consignor does not lose his right to sue (*B. B. & C. I. Railway v. Siyaji Mills*, 101 I. C. 689). The Supreme Court has also taken the same view in *Union of India v. West Punjab Factory Ltd.* A. I. R. 1966 S. C. 395 on the right of an endorsee of the Railway Receipt to sue. The opinion is not uniform. It has been held in some cases that endorsee can sue and even a blank and unsigned endorsement is sufficient (*Jalan & Sons v. Governor-General* 1949 (East Punjab) 190; *State of Bihar v. Union of India* 1959 Pat. 438; *Samrath Lal v. Union of India* 1959 M. P. 309; *Union of India v. Tabar Ali*). A. I. R. 1952 Orissa 126; The Calcutta High Court was of the view that an endorsee cannot sue unless property in the goods had passed to him (*Commissioners Port of Calcutta v. General Trading Corporation* 1964 Cal. 290). The Supreme Court has, however, held that while an endorsement may pass property in the goods it does not transfer the contract contained in the receipt on the statutory contract U/s. 74 E of the Railways Act.

No. 124—Suit for refund of an overcharge made by the railway

1. On June 20, 1925, the defendants through their servants at Basti station accepted from the plaintiff's agent 200 sleepers for transport by goods train to Bhagalpur, and charged Rs. 220 from the said agent and granted Railway Receipt No. 1262.

2. The correct charge for the said sleepers according to the schedule laid down in the goods tariff issued and published by the defendants should have been Rs. 130 only.

(This is Sec. 76-D after the 1961 amendment). Further that a Railway Receipt cannot be accorded the benefit which flow from negotiability so as to entitle the endorsee to sue the carrier. But the plaintiff may prove that he is an assignee of the contract of carriage and may sue as such (*Mosir Merkantile Bank Ltd. v. Union of India* A. I. R. 1965 S. C. 1954). The Assam High Court in the case of *Shree Shyam Stores v. Union of India* A. I. R. 1971 A. & N. 59, discussed the entire law and held that a mere endorsement of R. R. does not vest the right of suit. The endorsee must prove that the property in goods has also passed to him. See also *Union of India v. Ram Pd. Mool Chand* A. I. R. 1971 Bom. 52.

Contract or tort : The liability of the carrier may be based on contract or on negligence, sometime it can be based on both. It is sufficient to allege the material facts. Whenever a breach of duty is alleged the facts from which the duty arises must be stated. If the contract is one, the facts of which must be pleaded in order to establish the duty of which the defendant is alleged to have committed breach, the suit is one on contract. If the facts are such that the plaintiff can show a duty without relying on the contract, the plaintiff may sue in tort in spite of the existence of a contract (*Kelly v. Metrop. Railway*, (1895) I. Q. B. 944). For presumption of negligence of Railway see *Union of India v. Khalilul Rahman* A. I. R. 1971 Cal. 347. A man who is no party to a contract may sue for the negligent performance of that contract provided it was entered into with express reference to himself; thus an infant or a servant may recover damages for injuries received in a Railway accident, although his parents or master took his ticket for him. A servant may sue for loss of his own luggage though his master took the ticket (*Marshall v. York N & B. Railway*) (1851) 11 C. B. 655). A claim for shortage in weight of goods carried under risk-note is a suit on contract, and when it is so brought it is not competent to court to pass a decree as if the suit was one in tort for damages for delay (*M. & S. M. Railway v. Gopal Rai* 94 I. C 510, 1926 (Pat. 273).

Suits in respect of State Railways should be brought against the Union of India. Summons should be served on such pleader as the Central Government may appoint under Order 27 Rules 8-B and 4 C. P.C.

(Or, 2. The defendant's servants at Bhagalpur station said to the plaintiff that charge should have been made not by weight as made at Basti but by measurement and therefore they wrongfully refused to deliver the said sleepers to the plaintiff until the plaintiff paid them an alleged under-charge of Rs. 90, and the plaintiff had therefore to pay, and he did pay, on July 1, 1925, Rs. 90 to the defendant's servants at Bhagalpur.

Luggage : Under S. 75 of the Railways Act, the Railway Administration is not responsible for the loss, damage, destruction, deterioration or non-delivery of any luggage belonging to a passenger unless a railway servant has booked the luggage and given a receipt therefor. In case the luggage is carried by the passenger in his own charge, it must be proved in addition that the loss etc. was due to negligence or misconduct of the railway administration or any of its servants. If compensation for luggage is claimed these facts must be alleged in the plaint.

Personal injury : Suits for personal injury by negligence of Railways are suits based on torts. The liability of the railways in respect of injuries caused by accidents to trains carrying passengers is governed by S. 82 A of the Railways Act, and that in respect of accidents at Sea by S. 82 of the Act. S. 79 provides for settlement of compensation for injuries to officers, soldiers, sailors and airmen and followers on duty.

Damages : Plaintiff should try to minimize his damage. If goods have deteriorated he should take delivery and claim loss. If he does not take delivery he cannot claim damages (*Secretary of State v. Devi Ditta*, 148 I. C. 489; *Laduram v. Secretary of State*, 59 C. L. J. 467, 1934 (Cal.) 834). The measure of damages ordinarily is the value of the goods at the time they should have reached the consignee and loss of profits is not the ordinary consequence of non-delivery unless special circumstances were brought to defendants notice (*G. A. Jolli v. Dominion of India*, 1949 Cal. 380. *Union of India v. Jogendra Chandra A. I. R. 1976 Pat. 24.*)

Notice : Many suits are lost for want of a proper notice. No suit can be brought against a Railway for refund of an over-charge in respect of goods or animals, or for compensation for the loss, damage, destruction, deterioration or non-delivery of animals or goods delivered to be carried, unless the claim has been preferred in writing to the Railway administration within six months from the date of delivery of the animals or goods for carriage by the Railway (Sec. 78-B). In cases of non-delivery or delay in delivery, however, demand of information or inquiry made in writing from or complaint in writing to, the Railway administration with particulars sufficient to identify the consignment, is deemed to be a claim for the purposes of S. 78 B. It is not necessary that the claim should be in the form of a notice. It may be in the form of application or in any other form, such as a letter (*Bala Prasad v. B. N. W. Railway*, 106 I. C. 311, O. W. N. 909, 1927 (Oudh) 478). Such notice may be served, in the case of State Railways on the Chief Commercial

3. Under the rules laid down in the defendant's goods tariff, the charge was correctly made at Basti).

The plaintiff claims refund of Rs. 90 with interest at 1 per cent per mensem by way of damages from the date of overcharge upto date, with further interest upto the date of payment.

No. 125—Suit for loss of luggage

1. On June 6, 1925, the plaintiff purchased a ticket at Saharanpur station for journey from Saharanpur to Simla by the Railway owned by the defendant.

Manager (*Sham-sulhaq v. Secretary of State*, 1930 Cal. 332; *Sristhidar v. G.G. in Council* *ibid*) or General Manager or General Traffic Manager (*Shamji v. N. W. Ry.* 1947 Bom. 169, and 48 Bom L. R. 698) and in case of Company owned Railways on the agent in India (Sec. 140), and a notice sent to any subordinate official of the Railway will be of no avail (*Cawnpore Cotton Mills v. G. I. P. Railways*, 21 A. L. J. 223; *Ram Sahai v. E I Railway*, 20 A. L. J. 644, *Sabebdin v. E. I. Railway*, 13 O. L. J. 15, 3 O. W. N. 156, 93 I. C. 22). A joint notice to the Superintendent-General and Agent was held sufficient (*Bhayyalal v. Agent B N. Ry.*, 1944 (Nag.) 362.) The Lahore High Court has taken a lenient and more reasonable view and held that where the agent has entrusted the duty of receiving claims to a subordinate officer, notice to the latter is sufficient (*Deviditta v. Secretary of State*, 95 I. C. 808, 8 L.L. J. 206, 1926 (Lah.) 253, 7 L. 238; *contra*, *E. I. Railway v. Sewa Lall*, 112 I. C. 616 Pat.) The same view has been taken by various other High Courts that if the Railway by its course of business has entrusted the duty of dealing with claims to an officer notice to the latter is sufficient (See *Governor-General v. Gauri Shanker*, 1949 Pat. 347 and cases cited in that case). A notice to the General Manager was sufficient when a reply had been received from them denying the liability of the Ry. Co. (*Governor-General-in-Council v. Gopali*, 1944 Oudh) 81, 213 I. C. 7). Where Superintendent General used to deal with such claims, though not expressly authorized to receive notice and was subsequently authorized to receive notices also, it was held that notice sent to him even before authorization would be valid (*Govind Lal v. G. G. in Council*, 1948 (Nag.) 17). It is, therefore, always advisable to send a notice to the manager or agent as soon as the loss occurs, though correspondence may be continued with other officers, as any time spent in correspondence will not be excluded (*Badridas v. Governor-General*, 1947 Pat. 118). But in case where a notice was sent by post to the manager who accepted it and did not return it to the sender but detained it, the High Court took a lenient view and presumed that the manager did so with the implied consent of the Agent (*Chaturbhuj v. Secretary of State*, 99 I. C. 62, 1927 (All.) 215). Where a Railway Company received notice of a claim through another Railway Company and made enquires and replied to the claimant,

2. The luggage of the plaintiff was booked by the defendant's servants at Saharanpur for being carried to Simla in the luggage van, and a receipt No. 243 was given to the plaintiff for the same. Or if the luggage was in charge of the plaintiff "was being carried in charge of the plaintiff in the carriage in which he was travelling".

it was held that it cannot plead absence of notice (*Dhanpat v. Agent, B. B. & C. I. Railway*, 110 I. C. 718, 1928 (Lah.) 438).

A notice under Section 80, C. P. C. is further necessary if Government has to be sued as in case of State Railways (*Ali Asmat v. G. I. P. Railway* 124 I. C. 711, *A. Jamal Noor Md. v. G. G. in Council*, 1947 Cal. 26), and notice under Sec. 78-B (formerly 77) only is not sufficient (*Secretary of State v. Fazluddin*, 1932 A. L. J. 1033; *N. W. Railway v. Dwarka*, 1931 Pat. 393, *Balak Ram v. Secretary of State* 1935 A. L. J. 908). Notice under Sec. 80 should be served as required by that section and service on Manager of the Railway or on Collector is not sufficient, 1943 (All.) 158, nor one on Secy. Ry. Board (*Kumar Bros. v. Governor-General*, 1949 Lah. 165). It is open to a party to give a combined notice satisfying the requirements of both sections 80, C. P. C. and Sec. 77 *Railways Act* (*The G. I. P. Railway v. Mageti*, 109 I. C. 406, 1928 (Mad.) 599).

The preferring of a claim under Section 78-B being only a condition precedent need not be alleged in the plaint, but that of one under Section 80 must be alleged as required by that section (*Melaram v. Secretary of State*, 137 I. C. 205, 1932 A. L. J. 405, 1932 (All.) 381). The time, if any, given in a notice under Section 78-B cannot be excluded from limitation but that of the two months given in a notice under Section 80 is excluded under Section 15 (2), Limitation Act. The notice must reach the officer within six months (*Chaturbhuj v. Secretary of State*, 99 I. C. 622, 1927 (All.) 215). In any case it should be so posted that in the ordinary course it should be delivered within six months. It is not sufficient that the notice is posted within six months when it cannot possibly be delivered to the Agent within the time allowed by law (*Secretary of State v. Firm Imperial Metal Works*, 24 A. L. J. 360, 1926 (All.) 214, 93 I. C. 907, *Union of India v. Lakshmi Textiles A. I R.* 1968 Ker. 23). A contrary view has been taken by Patna High Court in *Ram Gopal v. B. N. W. Railway* (102 I. C. 607, Patna in which a notice posted on the last day of six months was held to be sufficient).

A claim under Section 78-B is not necessary in cases not covered by that section. Although in a claim for refund of overcharge, a notice is necessary, the Allahabad High Court took an equitable view in a case where such notice was physically impossible and held that suit could be maintained without such notice. In that case overcharge was made at the time of the delivery at destination which took place more than 6 months after delivery to railway by the consignor. (*Sheo Dyal v. G. I. P. Railway*, 97 I. C. 474, 1926 (All.) 698, 25 A. L. J. 89). Under the old S. 77, it was held that a notice was not necessary in cases of detention or conversion, *e. g.*, where railway admittedly in possession of goods

3. The defendant's servants did not carry the said luggage to Simla but by negligence and misconduct lost it upon the said journey or have retained it, whereby the plaintiff has suffered damage. Or by the negligence of the defendant's servants the carriage caught fire and the goods were destroyed.

fails to hand them over to the owner (*Harayna Cotton Mills v. B. B & C. I. Railway* 102 I. C. 149, 8 Lah. 555; *Shamshul Haq v. Secretary of State*, 1930 (Cal.) 332), or in other cases of tort (*Sundarji v. Secretary of State*, 152 I. C. 995, 1934 (Pat.) 507 see contra : 1962 M. P. 301.)

As the word 'non-delivery' had not been used in the former S. 77 there was a controversy as to whether it was necessary to prefer a claim under that Section in cases of non-delivery. The controversy has now been resolved by the word 'non-delivery' being used specifically in S. 78-B (corresponding to old S. 77). The purpose of preferring a claim was held by the Supreme Court in *Governor-General-in-Council v. Musaddilal* (1961 s. c. 725) to enable the railway administration to make inquiries and if possible to recover the goods and to deliver them to the consignee. It was also held that the Section imposed a restriction on the enforcement of liability against the railways. The earlier controversy as to whether the words "loss of goods" used in the Section meant loss to the owner or loss by the railway was also settled and it was held that the words meant loss or destruction or deterioration of the goods and consequent loss to the owner thereof. In (*Jetmull v. Darjeeling Himalayan Railway* (1962 S. C. 1879) it was held that keeping in view the purpose of the Section, claims made under it should be liberally construed.

Sections 76-D and 76-E now govern the responsibility if goods are carried on two or more railway administrations or transport systems and over railways in India and foreign countries. Under the former section if goods are carried on two or more railway administrations or over one or more railway administrations and one or more transport systems not belonging to any railway administration, the consignor will be deemed to have contracted with each one of the railway administrations or the owners of the transport systems that the provisions of Ch. VII shall apply as if the animals and goods had been carried by the railway of only one administration. It is, therefore, open to the plaintiff to sue all the administrations or systems concerned or only such of them as he holds responsible for the compensation he is claiming. But the non-booking administrations can be made liable only if loss occurred on their railway and the new sections do not enhance the liability which is still governed by Sec. 80 Railways Act. (*Union of India v. Brij Lal* A. J. R. 1969 S C. 817.) Indian railways are not responsible for loss etc. arising on railways outside India.

Limitation : It should be carefully remembered that here is period of three years for suits for compensation for loss or non-delivery of goods. It runs in the case of a suit for compensation for losing or injuring goods, from the time when the loss or injury occurs, and in a

<i>Particulars of damage</i>				<i>Value</i>
<i>Particulars of the Luggage lost</i>				<i>Rs.</i>
2 Tweed suits	..	..	..	160
1 Flannel suit	..	..	..	40
6 Twill shirts	..	..	..	24
2 Pairs Drill trousers	..	..	..	14
6 Cotton <i>Dhotis</i>	..	..	..	18
2 Cotton Tweed suits	..	..	..	40
4 Vests	..	..	..	13
12 Handkerchiefs	..	..	..	6
6 Towels	..	..	..	6
2 Pairs of shoes	..	..	..	27
6 Collars	..	..	..	6
6 Ties	..	..	..	12
6 Pairs of Socks	..	..	..	10
Leather suit-case	..	..	..	30
Bedding (Mattress Rs. 10, 2 Sheets Rs. 6, 2 Pillows Rs. 5, 2 Blankets Rs. 24, Holdall Rs. 15)				70
Total				476

suit for non-delivery of, or delay in delivering goods, from the time when the goods ought to have been delivered (Articles 10 and 11). The articles applicable under the Act of 1908 were Arts. 30 & 31. These Articles apply to Railways as well as to other carriers (*Footwear v. N. W. Railway*, 144 I. C. 1029, 1933 (All.) 348; *Secretary of State v. Golab Rai*, I. L. R. (1937) 2 Cal. 614). In *Jetmull v. Darjeeling Himalayan Railway Co.* (1962 s. c. 1879) it was held that where a suit was for compensation for damage to goods which were eventually delivered the appropriate article was Art. 30 of the old Limitation Act and not Art. 31 and that the burden would be on the railway who want to non-suit the plaintiff on the ground of limitation to establish that the loss or injury occurred more than one year before the institution of the suit. In *Bottamull v. Union of India*, (1962 S. C. 1716) the Supreme Court interpreted article 31 and held that it applied if there was non-delivery or delay in delivery. The words "when the goods ought to be delivered" were construed as meaning the reasonable time taken in the carriage of the goods from the place of despatch to the place of destination if there was no term in the contract from which time could be inferred expressly or impliedly. What would be reasonable time depended upon the circumstances of each case. Where bulk of the goods have been delivered and only a part has not been delivered it is that within which the bulk has been delivered.

The plaintiff claims Rs. 476, with interest from date of suit to that of payment.

RECTIFICATION (qq)

No. 126—Suit for rectification of a sale-deed

1. The plaintiff is owner of the entire *mahal* 10 biswas in village Ramnagar, Tahsil Rampur, District Ambala. The said *mahal* is sub-divided into several *pattis*, one of which is *patti* Ramkali consisting of land corresponding to a 2 biswas share of the said *mahal*.

Defence : The Railway may plead that the loss etc. was due to one of the causes mentioned in S. 73 and that they had used reasonable foresight and care. They may also plead one or more of the other grounds absolving them from liability under the provisions of Ch. VII of the Railways Act, or may plead any special agreement as exempting them from liability. They may plead omission of claim under Sec. 78-B. They may plead that the parcel or package contained articles of the class mentioned in the 2nd Schedule of the Railways Act and were of value exceeding Rs. 100 but were not insured. For valuation each separate package is to be considered and not the entire consignment, *Mahesh Glass Works v. Governor General-in-Council*, 1950 A. L. J. 625. The words loss in old S. 75 was held to include case of non-delivery, *K. V. V. A. Chettiar v. Union of India*, I. L. R. 1957 Mad. 195.

(qq) An instrument can be rectified by court at the instance of a party to it, if, by reason of a mutual mistake or fraud, it does not express the real intention of the parties (Sec. 25, Specific Relief Act.). If the instrument is a decree, it has been held in some cases (*Bala Prasad v. Kannu*, 14 I. C. 41; *Bepin v. Jageshwar*, 66 I. C. 345, 26 C. W. N. 36, 34 C. L. J. 256; *Upadrashta v. Gudapattu*, 103 I. C. 384 Mad; *Moorudin v. Md. Omar*, 1940 Bom. 321) that rectification can be by suit. In *Azizullah Khan v. Court of Wards* (1932 All. 587), however, it was held that the decree could be amended under Section 152 C. P. C. The section was, however, held to be inapplicable in *Umashankar v. Ram Agyab* (1939 All. 231) and *Shujat Mand Khan v. Govind Behari*, (1934) All. 100, but it was not decided in these cases as to whether a suit would lie. A suit of rectification of decree was held to be maintainable in *Kistoormull v. Sattar Md.*, 1958 Raj. 276. If a mistake in the compromise has been repeated in the decree embodying the compromise (*Kusodbaj v. Braja Mohan*, 43 C. 47). If the compromise is not embodied in the decree it can be amended only by a suit for rectification (*Sankaran Namboodari v. Ranan Nambudiri*, 1961 Ker. 13). It is not absolutely necessary that an instrument should be rectified by a suit. If a suit is brought upon it, the defendant may plead facts entitling him to rectification and the court will then pass a decree upon it according to its true intention, or the party aggrieved may sue for a declaration of his title under the instrument as it should be pleading facts which will entitle him to rectification (*Palani v. Neebappa*, 53 I. C. 379 Mad.; *Sabaji v. Nawal Singh*, 104 I. C. 736 Nag.). If,

2. On December 14, 1924, the plaintiff agreed to sell and the defendant agreed to purchase, for consideration, a one-third share in the said *patti* Ramkali in the said *mahal* 10 biswas.

3. On December 15, 1924, a sale-deed was drawn up under the direction of the defendant, and was signed by the plaintiff and registered the same day.

4. In the said sale-deed, the property is described as a "one-third share in *mahal* 10 biswas" in the said village, and the defendant has thereby become owner of a much larger share than the plaintiff had contracted to sell.

5. The aforesaid wrong description of the property sold was procured in the sale-deed by the defendant fraudulently.

in spite of wrong description of property sold, right property has actually been transferred to the vendee's possession, the latter's title is good and though he may not have brought a suit for rectification of sale-deed he can always show by oral evidence that the property in his possession was really intended to be transferred (*Kesho Singh v. Roopan Singh*, 100 I. C. 568 All.). A person who seeks to rectify a deed upon the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must show exactly and precisely the form to which the deed ought to be brought (*Raja Ram v. Manik*, A. I. R. 1952 Nag. 90). A failure to rectify a sale-deed does not extinguish title to the property which was really sold but was not properly described in the sale-deed due to mistake. Sec. 26 of the Specific Relief Act, 1963, is an enabling section and therefore the fact that a plaintiff did not choose to avail himself of the section cannot deprive him of the rights which he had acquired under a sale-deed. The same principle is applicable in the case of defendant who can successfully resist a suit on the ground that the property in his sale-deed was wrongly described though he has not filed any suit for rectification (*Raja Ram v. Nanik Ram*, A. I. R. 1952 Nag. 90). A transfer in excess of the legal rights of a transferor does not entitle a transferee to have the instrument of transfer rectified under section 26 of the Specific Relief Act, 1963. Where a widow having two minor daughters sold her husband's property for discharging his debts and the document was drawn up in such a way that it purported to be a sale of the minors property by her in her capacity as their guardian the fact that in law the widow was competent to convey only her own interest and the minor did not have a present interest in the property, does not necessarily mean that the instrument did not truly express the intention of the parties. (*Ratneswar Goswami v. Mongoli Chutiani*, A. I. R. 1951

Particulars of the fraud : The defendant falsely and fraudulently represented to Duni Chand, the scribe of the sale-deed, that the plaintiff had agreed to sell a one-third share in the whole *mahal* 10 biswas aforesaid, and induced the said Duni Chand by the said representation to enter the said wrong description of property sold in the sale-deed. After the deed had been drawn up, the defendant fraudulently represented to the plaintiff that it correctly described the terms of the agreement of the parties and, by this representation, which was false and which the defendant knew to be false, he induced the plaintiff to affix his signatures to the deed. (Or, the defendant entered into an unlawful conspiracy with Duni Chand, the scribe, with a view to cause injury to the plaintiff and, in pursuance of that conspiracy, the said Duni Chand entered the aforesaid wrong description of the property in the sale-deed, and the defendant represented falsely and fraudulently to the plaintiff that the deed contained fully and correctly the terms of the contract between the parties. Further, when the said Duni Chand read out the contents of the sale-deed to the plaintiff he read out the description of the property according to the agreement between the

Assam 70). The plaintiff should allege in the plaint what the intention of the parties to the instrument was, and the fact that it was not correctly expressed in the instrument, showing exactly the variance between the intention and its expression. He must next allege the fraud (with particulars) or the mistake which caused the discrepancy. In case of mistake it must be alleged that it was mutual, for a unilateral mistake is no ground for rectification.) *Bepin v. Jogeshwar*, 34 C. L. J. 256). The claim may be based alternatively on fraud and on mutual mistake. **The plaintiff must show substantial injury to him**, as the relief, being discretionary will not be granted if the error is not substantial.

Court-fee Should be paid on the value of the subject-matter of the suit, *i.e.*, according to the value of the benefit which the plaintiff will derive from the rectification.

Limitation is three years under Article 113 from the time when the cause of action accrues.

Defence : The defendant may deny the alleged fraud or may show that there is no error in the instrument. If he is a transferee from the original party, he may plead that he is a *bona fide* transferee for value, and rectification cannot be granted so as to prejudice his rights.

parties and contrary to what he had written in the sale-deed).

6. In the alternative, the plaintiff says that the description of the said property was wrongly written in the sale-deed by reason of mutual mistake of the parties, and both the parties remained under the impression that it was correctly entered according to the agreement.

The plaintiff claims that the said sale-deed be rectified by addition of the words "*in patti Ramkali*" between the words "*one-third share*" and "*in mahal 10 biswas*" in the description of the property sold as given in the said sale-deed.

RESCISSION OF CONTRACT (rr)

No. 127—Suit for rescission on the ground of misrepresentation

1. On December 22, 1958, the defendant represented that he was the exclusive owner of the house detailed at the foot of the plaint and that he had no sons or any other member of a joint family having any interest in the property.

2. The plaintiff was thereby induced to purchase the same in the belief that the said representation was true, and he signed an agreement on the said December 22, 1958, and paid Rs. 2,000, as earnest money, but the property has not yet been transferred to him.

(rr) A contract can be rescinded under Sec. 27 Sp. Rel. Act 1963, if it is voidable or terminable by the plaintiff, or when it is unlawful for any cause not apparent on the face of it and the defendant is more to blame than the plaintiff. When the defendant purchaser had obtained a decree for specific performance and he makes default in payment of the purchase money or other sums, the plaintiff must apply to have the contract rescinded (S. 28) though if the decree is properly framed and the defendant's suit is dismissed on such default, it would hardly be necessary for the plaintiff to have the contract rescinded. A separate suit for rescission of contract will not lie in view of Sub-sec. (4) of S. 28. The plaint in a suit for rescission must contain allegations (1) of the contract, and (2) of the grounds on which it is sought to be rescinded. If fraud, undue influence, etc., are alleged as the ground, particulars of the same should be given. An allegation that the contract is unlawful is not sufficient. It must be shown that the unlawfulness is not apparent on the face of the contract and that the parties are not in *pari delicto*.

3. On March 4, 1959, the plaintiff came to know that the defendant has got two minor sons who are the members of a joint Hindu family with him, and have got an interest in the aforesaid property.

The plaintiff claims—

- (1) Rescission of the contract.
- (2) Cancellation of the agreement of December 22, 1958.
- (3) Refund of Rs. 2,000, with interest from the date of suit to that of payment.

Details of the house

No. 128—Suit for rescission on the ground of fraud

1. By an agreement in writing, dated January 4, 1958, the plaintiff agreed to purchase from the defendant, the house detailed at the foot of the plaint, for a consideration of Rs. 20,000 and the plaintiff paid Rs. 500 to the defendant as earnest money.

2. In order to induce the plaintiff to make the said contract and to execute the said agreement and to pay the said money, the defendant represented to the plaintiff that the monthly rent of the said house was Rs. 100.

3. The plaintiff was induced to, and he did, make the said contract and execute the said agreement, and did pay the said money, on the faith of the said representation.

4. The plaintiff has since discovered, on March 15, 1958, and the fact is, that the said representation was false and that, as a matter of fact, the monthly rent of the said house was, and is only Rs. 50.

5. The defendant made the said representation fraudulently, well knowing that it was false.

Limitation : There years from the date when the facts entitling the plaintiff to the relief became known to him (Act. 59).

The date of such knowledge should also be alleged in the plaint.

Court-fee must be paid on the value of the relief, as in the case of "Cancellation". See note (g) *ante*.

The plaintiff claims—

1. Rescission of the contract.
2. That the said agreement may be delivered up and cancelled.
3. Refund of Rs. 500 with Rs.....on account of interest by way of damages, and further interest from the date of suit to that of payment.

Details of the house

No. 129—Suit for rescission of a contract on the ground of mistake

(*Form No. 34, Appendix A, C. P. C.*)

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant situated at , contained (ten bighas).

2. The plaintiff was thereby induced to purchase the same at the price of Rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19 , the plaintiff paid the defendant Rupees as part of the purchase money.

4. That the said piece of ground contained in fact only (five bighas).

The plaintiff claims—

(1) Rupees, with interest from the day of 19 .

Defence : Besides denying the existence of the grounds on which rescission is claimed, a defendant may pray for restoration of the benefit which the plaintiff has received under the contract (Sec. 30 Sp. Rel. Act, 1963). In a suit for rescission on the ground of mistake, the defendant may plead that his position has been so substantially changed by the contract that he cannot be restored to his original position if the contract is rescinded. When the ground is unlawfulness of the contract, he may plead that the plaintiff was equally, if not more, to blame,

(2) that the said agreement be delivered up and cancelled.

SALE OF GOODS

No. 130—Suit for price of goods sold at fixed price and delivered

(From No. 3, Appendix A, C. P. C.)

1. On the day of 19 , E. F. sold and delivered to the defendant (one hundred barrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods).

2. The defendant promised to pay rupees for the said goods on delivery (or on the day of , some day before the plaint was filed.)

3. He has not paid the same.

4. E. F. died on the day of 19 . By his last will he appointed his brother, the plaintiff, his executant.

5. The plaintiff as executor of E. F. claims (Relief claimed).

No. 131—Suit for price of goods sold and delivered when no price fixed (ss)

1. On January 4, 1924, it was verbally agreed between the plaintiff and the defendant that the plaintiff should sell,

He may plead that the contract is void *ab initio*, hence there is no necessity for its rescission. If rescission is claimed on the ground of misrepresentation, he may plead that the plaintiff had means of discovering the truth with due diligence or that the contract was not caused by such misrepresentation and the plaintiff knew the true facts (Sec. 19 Contract Act). The defendant may claim the benefit of S. 64, Contract Act (*Muralidhar v. Inevnational Film Co.*, 1943 (P C.) 34.)

(ss) **The contract of sale must be alleged, as also the agreement to pay the price.** If price was not settled, a reasonable price can be claimed under Sec. 9, Sale of Goods Act 1930 and, in such a case, the plaintiff must allege in the plaint what he claims to be the reasonable price. **It should be distinctly alleged when the price was agreed to be paid, whether before the goods were received from the plaintiff's premises, or on their reaching the defendant or after**

and deliver to the defendant at Multan, any grain and sugar ordered by the latter, that the defendant should pay the price on delivery and that if the price was not so paid, the defendant should pay interest at Rs. 7-8 per cent per annum.

2. From January 4, 1924, to October 14, 1925, the plaintiff sold and delivered to the defendant under the latter's instructions contained in letters received by the plaintiff, wheat and sugar from time to time. Particulars are given in the account given below.

3. No price was fixed between the parties, but according to the market rates prevailing at the time of the said sales, the price and other costs of the goods sold come to Rs. 4,337. The defendant made total payments of Rs. 2,000 only. Particulars of the amount due from the defendant, of the payments made by him, and of the interest due to the plaintiff, are given in the account at the foot of the plaint. Under the said account, Rs. 2,524-5-0, is now due from the defendant to the plaintiff.

The plaintiff claims Rs. 2,524-4-0, with interest from date of suit to that of payment.

a specified time, for no suit can be brought until the price becomes payable. The delivery of goods should further be alleged. If it was not made personally to the defendant it should be specified how it was made. Delivery to a carrier would be sufficient only if the defendant has been placed in a position to claim delivery thereby from the carrier or if the carrier was a nominee of the defendant (*Narain Singh v. Tulsiram*, 174 I. C. 932, 1937 (Lah.) 785). If the suit relates to a series of sales, all made under one agreement, the agreement may be alleged in the beginning and then sales may be alleged either each specifically or, if the number is large, they may be detailed in particulars appended to the plaint. Expenses and costs can be claimed only when contracted for, when they were necessary for the fulfilment of the contract. Cost of notice of demand, or of sending a man to the defendant to realize the balance due cannot be claimed from the defendant unless there was an express agreement for its payment (*Majety v. Cuppala*, 109 I. C. 649, 1928 (Mad.) 476). In the absence of an agreement, price of goods is presumed to be payable where the seller resides (*Firm of Hardial v. Bathal Das*, 118 I. C. 898 Lah.).

Limitation : Three years under Arts. 14, 15 or 16 or 17 as the case may be.

Defence : The defendant may plead that the goods sent were not

**No. 132—Suit for price of goods sold and delivered
when no price fixed**

(Form No. 41, Appendix A, C. P. C.)

1. On the day of 19 , plaintiff sold and delivered to the defendant (sundry articles of house-furniture), but no express agreement was made as to the price.

2. The goods were reasonably worth rupees.

3. The defendant has not paid the money.

**No. 133—Suit for damages for not accepting goods
purchased (tt)**

1. The defendant, by a letter of January 14, 1925, asked the plaintiff to sell to him 100 maunds of sugar, at the market rate, and send it to an agent at Multan for delivery to the defendant on receipt of the price.

according to order or were short of what are entered in the invoice. He may question the rate claimed if none was agreed upon. He may question his liability to pay other incidental expenses. When a number of goods which are identical are agreed to be sold it can be pleaded that specific goods were not sold (*Provincial Automobile Co., Ltd. v. State of M. P.* 1952 N. L. J. 149).

If the goods were sold with a warranty, breach of the warranty is no defence, though the vendee may claim compensation for the breach by way of equitable set-off. A breach of an express or implied warranty does not give the buyer a right to rescind the contract or to treat it as repudiated (*Kisen Chand v. Ram Pratap*, 44 C. W.N. 505; *Gbluam Md. v Granver*, 42 P. L. R. 172). But if they were sold with a condition, the breach of it gives rise to a right to treat the contract as repudiated. See Sec. 12, Sale of Goods Ac, 1930.

(tt) It should first be determined whether the property in goods has or has not passed to the purchaser. If the property has passed even though the goods may still be in possession of the seller, the seller should sue for recovery of the contracted price, (Sec. 55 (1), Sale of Goods Act, 1930) or he may, under Section 54, re-sell the goods after giving a reasonable notice to the buyer and sue the buyer for any loss sustained by such re-sale, but re-sale must be made within a reasonable time (*Nikkumal v. Gurus Prasad*, 134 I. C. 777, 1931 (Lah.) 714); *Chidambra Nadar v Vadivel*, 159 I. C. 1031, 1936 (Mad.) 47) and after notice to buyer (*Nathumal v. Ram Sarup*, 35 P. L. R. 609). If sale is held without notice and results in loss no damages can be claimed. *Messrs. Kalka Pershad v. Harish Chandra*, 1957, All 25. In such cases he cannot sue for the unpaid price (*Chidambara Nadar v. Vadivel*, 1936 (Mad.) 47, 159 I. C. 1031). Where re-sale is made after undue delay, it cannot afford

2. On January 20, 1925, the plaintiff sent 100 maunds of sugar to the firm of Rajalal Ram Gopal at Multan, and instructed them to deliver the same to the defendant on receipt of the price and cost of transport.

3. The said firm duly tendered the said goods to the defendant who, on February 5, 1925, refused to accept delivery of the said sugar or any part thereof, or to pay the price to the said Rajalal Ram Gopal. The plaintiff has thereby suffered damage.

Particulars

Difference between the price at the market rate on January 20, 1925, at Muzaffaranagar (Rs. 20 per maund) and that at the market rate on February 5, 1925, at Multan (viz. Rs. 18-8-0 per maund) at Rs. 1-8-0 per maund on 100 maunds Rs. 150

Cost of transport from Muzaffarnagar to Multan Rs 110

Total Rs... 260

The plaintiff claims Rs. 260, with interest from date of suit to that of payment.

**No. 134—Suit for deficiency upon a re-sale
(goods sold at auction)**

(Form No. 6, Appendix A, C. P. C.)

1. On the day of 19 , the plaintiff put up to auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within [*ten days*] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [*one crate of crockery*] at the auction at the price of rupees.

a basis for assessment of damages, which, in such a case should be calculated on the difference between the market rates (*Jasratmal v. M. L. Jaini & Co*, 39 P. L. R. 945; *Mohan v. Khuda*, 184 I. C. 43, 1939 (Lah.) 260). If the property in the goods has not yet passed to the purchaser, the seller can only sue for damages for breach of contract to purchase and, in such cases, the sum which is recoverable is usually the difference

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [ten days] after the sale nor afterwards.

5. On the day of 19 , the plaintiff re-sold the [crate of crockery], on account of the defendant by public auction, for rupees.

6. The expenses attendant upon such re-sale amounted to rupees.

7. The defendant has not paid the deficiency thus arising, amounting to rupees.

No. 135—Suit for price of goods purchased but not accepted by the defendant

1. By a verbal agreement, on April 20, 1925, the defendant purchased 40 bags containing 80 maunds of sugar from the plaintiff at Rs. 18 per maund, and it was agreed that the plaintiff should weigh the sugar and put it into bags and keep them ready for being delivered to the defendant's order.

2. On May 7, 1925, the plaintiff filled and set apart in his godown 40 bags of sugar appropriating them to the said agreement, and verbally informed the defendant at his shop the same day of the said appropriation, and the defendant promised to take delivery of the said bags within one week.

3. The defendant has not yet taken delivery of the said bags nor has he paid their price or any part thereof.

between the contract price and the market price on the date on which the breach of contract has taken place, (*Ishar Das v. Dhanpat Rai*, 106 I. C. 57, 8 Lah. 514, 1927 (Lah.) 687; *Sital Prasad v. Ranjit Singh*, 1931 A. L. J. 390, 1931 (All.) 583), The Seller has no right of resale in such cases (*Ambalrana Chehlar v. Express News Papers Ltd.*, A. I. R. 1968 S. C. 74.) Contract Act applies to sale of goods also (*B. Muriswami v. B. Muriswami*, 1944 (Mad.) 418). The market rate prevalent at the expiration of what would be considered a reasonable time in which re-sale should have taken place is immaterial (*Kolathu v. Muhammad*

The plaintiff claims Rs. 1,440, with interest from date of suit to that of payment.

**No. 136—Suit for not accepting delivery of part
and for price of part accepted**

1. On August 14, 1920, at Delhi the defendant placed an indent No. 169 signed by the defendant, for 18 cases of coloured glazed paper, each case containing 50 reams, at Rs. 12 per ream, to be delivered at Delhi in three lots of six cases each in October, November and December, 1920. The plaintiff accepted the said indent by letter of acceptance, dated August 10, 1920.

2. The plaintiff accordingly delivered two lots each of six such cases of the said paper in October and November, 1920 to the defendant who accepted the same.

3. The plaintiff was ready and willing to deliver the remaining six cases in December according to the contract referred to in paragraph 1 above but the defendant, by his letter dated December 14 and received by the plaintiff on December 18, 1920, wrongfully refused to accept or pay for the same, whereby the plaintiff lost the benefit of the said contract.

4. The defendant has not paid the price of 12 cases actually delivered.

Particulars : Price of 12 cases (600 reams) delivered,
at Rs. 12 per ream Rs. 7200

Difference between the contract price and market price
on December 16, 1920 of 6 cases (300 reams) at Rs. 2 per
ream Rs. 600

Haji, 29 Cochin 517). If the seller has re-sold the goods, he cannot recover the loss sustained by such re-sale (*Firm of Ganga Ram v. Kadoomal* 88 I. C. 571, A. I. R. 1925 (Singh) 222), unless the re-sale was authorized by the contract S. 62 does not bar such a contract (*Sheonarain v. New Sevan Sugar Refining Co.*, 1938 (All.) 272, 175 I. C. 552, 1938 A. L. J. 227). But where the price is payable on a fixed day irrespective of delivery, the seller can sue for the price although the property has not yet passed to buyer and the goods have not been appropriated to the contract, Sec. 55 (2). As to when the property in goods sold passes

The plaintiff claims Rs. 7,800 with interest from date of suit to that of payment.

No. 137—Suit for damages for not accepting goods and, in the alternative, for loss on re-sale

1. By an agreement in writing, dated March 14, 1920, executed by the parties at Delhi, the plaintiff agreed to sell, and the defendant agreed to buy, 25 cases of white shirtings D1, each case containing 50 pieces, at Rs. 10-9 per piece, shipment to be in one lot in January, 1921, with 60 days latitude in shipment time. The defendant agreed by the said agreement to take delivery of the goods, and to pay for them, on arrival at Delhi.

2. The said 25 cases arrived at Delhi on May 14, 1921 and the defendants accepted delivery of, and paid for, 10 of such cases.

3. At the request of the defendants, the plaintiffs, from time to time agreed to postpone delivery of, and store for the defendants for a reasonable time the remaining 15 cases upon the defendants undertaking to pay all cartage, housing and ware-housing charges and interest upon the price of the said 15 cases.

Particulars

The said requisits are contained in or to be implied from various letters between the parties from May 16, 1921 to May 30, 1921, and the said undertakings and each of them are to be implied from the said requests and the previous dealings and course of business between the parties.

to the buyer, *see* Secs. 18-25. There is no objection to a suit being brought alternatively for price of goods and for damages for not accepting the goods, or for loss sustained on re-sale on the allegation that property in the goods has passed to the buyer and for damages for not accepting goods. When it is doubtful whether the property has or has not passed, or when there is a suspicion that the defendant may deny the facts which are alleged by the plaintiff as showing the passing of ownership in the goods, it is always advisable to bring the suit in the alternative form. In the absence of special circumstances no interest can be allowed on such damages (*Sukh Dial v. Hetram*, 40 P. L. R. 531).

4. By a registered letter dated August 20, 1921 the plaintiffs by their agents gave to the defendants notice of their intention to sell the said goods and the defendants did not within a reasonable time, or at all, tender the price, and on September 4, 1921, the plaintiff re-sold the said goods through Messrs. Chandra Kishore and Sons, Public Auctioneers, Delhi realizing thereby the sum of Rs.....

The plaintiffs claim—

(1) Rs....., as the loss on re-sale of the said 15 cases.

(2) Rs....., on account of the expenses of carting and warehousing the said 15 cases.

Particulars of expenses.....

Alternatively,

Rs.....as damages for not accepting the said 15 cases purchased by the defendants.

Particulars : Difference between the contract price and market price on May 14, 1921 of the 15 cases containing 750 pieces at Rs.....per piece Rs.....

And, in either case—

Interest on the amount decreed from the date of suit to that of payment.

The plaintiff must allege the contract for sale, with necessary terms. In an ordinary case of refusal to accept the goods and to pay for them, the plaintiff must allege his tender and defendant's refusal. In a claim for price, the plaintiff must allege facts showing that the property or ownership in the goods has passed to the defendant or allege that the price was agreed to be paid on a fixed day irrespective of delivery. If the claim is for loss on re-sale notice to the defendant must be alleged.

Limitation : Three years under Art. 55 as this is case of breach of a contract.

Defence : In such cases defence usually is that the plaintiff was not ready and willing to deliver the goods or that the plaintiff was not ready and willing to deliver the same within stipulated time, when time was of the essence of the contract, or within a reasonable time, or that the goods offered were not according to sample or of the quality contracted for, or they were sent with other goods which were not ordered and there was difficulty in separating them or that they were ordered

No. 138—Suit for balance due on account of mutual sales and purchases of shares

1. The defendant purchased from the plaintiff.

(i) On July 2, 1925, 100 ordinary shares in the Presidency Jute Mills Co. Ltd., at Rs. 6-10 per share, and

(ii) On July 18, 1925, 200 ordinary shares in the Madan Theatres Ltd., at Rs. 3-4 per share.

2. On August 10, 1925, the defendant sold to the plaintiff 150 ordinary shares in the National Co. Ltd., at Rs. 27-8 per share, 100 ordinary shares in Clive Mills Co. Ltd., at Rs. 35-4 per share, and 50 ordinary shares in Lansdowne Jute Co. Ltd., at Rs. 275 per share.

3. The defendant did not give or take delivery of the shares sold or purchased by him as aforesaid, at the time of such sales or purchases, but asked the plaintiff to wait, and the plaintiff agreed to wait, for the defendant to perform his obligations.

4. It was verbally agreed between the parties on July 2, 1925, that in respect of the shares purchased by the defendant from the plaintiff the defendant would pay interest at 9 per cent per annum on the price of the shares as from due dates mentioned in the contracts and on all sums due by the defendant to the plaintiff for the time being. The defendant further agreed to keep the plaintiff indemnified and protected in respect of any loss that the plaintiff might suffer by reason of his entering into transactions for shares with the defendant or at the request of the defendant.

5. On October 4, 1925 the defendant sold back 50 ordinary shares in the Presidency Jute Mill Co. Ltd., at Rs. 6-12 per share. The remaining 50 shares were sold back by the

for a specified purpose and were not fit for that purpose. As to implied warranty, *see* Section 15-17 and if the same has been broken, it affords a good defence, for example, if the goods are not reasonably fit for the purpose they are required for (*Baretto v. Pruce*, 1939 (Nag.) 19)

It is no defence that on the due date, the plaintiff was not actually in possession of the goods he had agreed to sell as the plaintiff can succeed

defendant before September, 1926, and all dues in respect of the said 50 shares were paid. The interest on the price of shares due by the defendant to the plaintiff amounted to Rs. 8-1 and, after deducting Rs. 6-4 due to the defendant on account of difference in the price of 50 shares, the defendant remained liable to pay to the plaintiff Rs. 1-13.

6. On September 5, 1925, the defendant purchased back from the plaintiff the aforesaid 150 ordinary shares in the National Co. Ltd., as follows:—75 shares at Rs. 26-1 and 75 shares at Rs. 28-2 per share. The difference in price amounted to Rs. 89-1 due by the plaintiff to the defendant. After setting off the transaction and deducting Rs. 27-4-6 on account of interest the defendant became entitled to get Rs. 61-13-6 from the plaintiff.

7. The defendant put off from time to time the delivery of the 100 shares in the Clive Mills and the 50 shares in the Lansdowne Jute Mills sold by him to the plaintiff and taking the delivery against payment of the 200 shares in the Madan Theatres Ltd. sold by the plaintiff to the defendants.

8. On or about February 5, 1926, after pre-emptory demand by the plaintiffs that the defendant should perform his obligations, the defendant took time till February 8, 1926, for the purpose, but even on that date the defendant failed and neglected either to give delivery of the shares sold by him or to take delivery of those purchased by him although the plaintiff was all along ready and willing to carry out his obligations.

9. On such default as aforesaid and after notice to the defendant, the plaintiff, on or about February 19, 1926, purchased 50 shares in the Lansdowne Jute Mills, at Rs. 31 per shares, and 100 shares in the Clive Mills, Co. Ltd. at Rs. 39-2 per share and the defendant thus became liable to

even if he can show that he had control of the goods or the capacity to deliver them, if the defendant had called for delivery even by making purchase in the market. It is not necessary for the plaintiff to allege in the plaint that he was ready and willing to deliver the goods, as that is a condition precedent and its averment is implied in the plaint. (*Kun-*

pay the loss amounting to Rs. 1,800 and Rs.387-8, respectively to the plaintiff.

10. The aforesaid sums of Rs. 1,800 and Rs. 387-8 also represent the difference between the contract price and market price of the shares in the Lansdowne Jute Mills and the Clive Mills when the defendant should have given delivery and the plaintiff alternatively claims these amounts as damages for breach of contract to sell the shares.

11. On February 18, 1926, after notice to the defendant the plaintiff sold the 100 shares in the Madan Theatres Ltd., on account of the defendant at Rs. 2-12 per share. The defendant thus suffered a loss of Rs. 50. Adding to this Rs. 18 on account of interest on the amount of price due to the plaintiff and deducting the sum of Rs. 20 on account of dividend credited in favour of the defendant, the defendant's liability to the plaintiff on account of the said shares comes to Rs. 48.

12. The aforesaid sum of Rs. 48 also represents the difference between the contract price and the market price on 100 shares in Madan Theatres Ltd., when the defendant should have taken delivery, and the plaintiff claims the amount alternatively as damages for breach of contract to purchase the shares.

13. On taking account of the sums mentioned in paras. 5, 6, 9 and 11 above Rs. 2,175-7-6 is due by the defendant to the plaintiff with Rs. 58-1-3 on account of interest at the agreed rate of 9 per cent per mensem from February 18, 1926, to date of suit.

The plaintiff claims Rs. 2, 233-8-9, with interest at 6 per cent per annum from date of suit to that of payment.

war Bhan v. Firm Ganpat Rail, 1926 (Lah.) 318, 94 I. C. 304; *Arjunsu Ragbusa Patwi v. Harak Chand Ram Chand*, I. L. R. 1938 Nag. 308, 1937 (Nag.) 345, 172 I. C. 812, 10 R. N. 246). According to Nagpur Court when a seller has no goods to deliver he suffers no damage which he can claim (*Vithulsa v. Raoji*, 151 I. C. 63, 1934 (Nag.) 129).

No. 139—Suit for damages for non-delivery of goods sold (uu)

1. By a contract in writing, dated April 16, 1925, the defendant sold and agreed to deliver 20 packages of long-cloth D1, each package containing 50 pieces, at Rs. 16 per piece, to be delivered at the defendant's godown at Delhi on payment of the price in cash, on October 20, 1925.

The plaintiff tendered the price to the defendant at the defendant's godown, on October 20, 1925, but the defendant refused to deliver any of the said packages for long-cloth.

Particulars of damages

Loss of Profit at Re. 1 per piece on 20 packages containing 1,000 pieces.....Rs. 1,000.

The plaintiff claims Rs. 1,000 with interest from date of suit to that of payment.

No. 140—Ditto

(Form No. 14, Appendix A, C. P. C.)

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19 , and that the plaintiff should pay therefor rupees on delivery.

(uu) **The contract of sale and its breach must be specifically alleged in the plaint.** Unless the defendant has made a definite promise to deliver the goods, the plaintiff must allege that he demanded delivery (Section 35, Sale of Goods Act). Ordinarily a plaintiff is not bound to allege or prove that he was ready and willing to perform his part of the contract unless the defendant expressly pleads and puts him to its proof (*Banarsilal v. Haji Abdulla*, 121 J. C. 723 L.). The damages which can be claimed in such cases are the difference between the contract price and the market price at the date of the breach (*Jamal v. Moolla Dawood*, 43 Cal. 493 (P. C.); *Arjunsal v. Mohanlal*, 1937 (Nag.) 345). Even if property in the goods has passed to the purchaser, still the plaintiff cannot claim the price for which the goods were sold by the defendant on a date long after the appointed date of delivery. He can claim only the price on the date fixed for delivery, less the unpaid price due to the defendant. (*Firm Bachraj v. Firm Khup Chnd*, 1949 Nag. 199). If price had been paid he can recover it with interest from the date of pay-

2. On the [said] day plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

No. 141—Suit for not delivering goods according to sample (vv)

1. By an agreement, dated June 27, 1921, the defendant sold and agreed to deliver to the plaintiff 60 pieces of Navy blue serge, each piece being 40 yards, at Rs. 6 per yard, as per sample, on November 20, 1925.

2. The defendant delivered in pretended fulfilment of his contract, 60 pieces on, or about, November 25, 1925. The said 60 pieces did not correspond with the sample and were atonce rejected by the plaintiff.

ment to that of judgment along with difference between the contract price and market price on the date of breach (*Ramehwar Das v. Refer Sales*, 1944 (Bom.) 21). In case of repudiation of contract damages cannot be claimed as on the date of repudiation but as on the date fixed for delivery (*Maung Po v. Sa*, 1933 (Rang.) 25). It has been held in *Shri Ram v. Trimbak*, 103 I. C. 645, 29 Bom. L. R. 1036, that in such a case the plaintiff cannot get a higher amount of damages than he is entitled to for breach of contract, by describing his claim as one for conversion in the alternative. But if the plaintiff required the goods for a particular purpose and has suffered special damage he can claim them only if he had given notice of the purpose and the special damage he was likely to suffer, to the defendant. Such notice should be alleged in the plaint. Sometimes ordinary damages are claimed in the alternative, with special damages. The plaintiff can also recover the earnest money which he has paid to the defendant, either as part of damages, or as money paid for a consideration which has failed (*Pyare Lal v. Madanlal*, 102 I. C. 766 A. held in 1962 All. 543 as impliedly overruled by Supreme Court in 1962 S. C. 256 on another point.)

Limitation : Three years under Art. 115.

Defence : Denial of the contract or breach, or of notice of special damages is the usual defence. But amount of damages may also be questioned or a plea may be raised that the defendant was ready to supply the goods but was prevented from performing the contract by an act of the plaintiff.

(vv) In such cases after accepting delivery, purchaser cannot reject the goods and sue for refund of price on the ground that the goods

3. The plaintiff has suffered damage by the defendant's breach of contract.

Particulars

Loss of profit at Rs. 20 per piece on 60 pieces—Rs. 1,200.

The plaintiff claims Rs. 1,200, with interest from date of suit to that of payment.

**No. 142—Suit for damages for non-delivery,
alleging special damage**

1. By a contract in writing, dated May 15, 1924, the defendant sold and agreed to deliver to the plaintiff 500 maunds of lime at Rs. 6 per maund, f. o. r. Dehra Dun, on or before June 15, 1924, and the plaintiff agreed to pay the price on delivery.

2. The plaintiff had entered into a contract with one Ram Bilas of Saharanpur, to supply him with the said quantity of lime before July 1, 1924, at Rs. 8 per maund, and had purchased the lime from the defendant for the purpose of supplying it to the said Ram Bilas. The plaintiff had verbally told these facts to the defendant at the time of entering into the aforesaid contract with him.

3. The defendant failed to deliver any part of the said lime within the said time, or at all.

4. The plaintiff was unable to purchase similar goods in the market and to supply the same to the said Ram Bilas and lost the profit he would have made on the re-sale.

The plaintiff claims Rs. 1,000, as damages, with interest from date of suit to that of payment.

are not according to the contract but his remedy is a suit for damages. (*Ishar Das v. Kannu Mal*, 100 I. C. 548 Lah.; *Nagadas v. Vel Mahomed*, 32 Bom. L. R. 454; *Empire Engineering Co. v. Municipal Board, Bareilly*, 119 I. C. 853, 27 A. L. J. 674, 1929 (All.) 801. The Calcutta High Court has held that he can also reject (*Lalchand v. Baijnath*, 63 Cal. 737), but in a subsequent case (*Joseph Mayr v. Phoni Bhusban*, I. L. R. (1938) 2 Cal. 88), where the plaintiff had kept the goods too long he was held not to be entitled to reject.

No. 143—Suit for damages for delivering inferior goods and not delivering part of the goods

1. By a verbal agreement on November 4, 1924, the defendant agreed to supply to the plaintiff by December 4, 1924, 1,000 maunds of best Muzaffaranagar wheat, of the sample given by the defendant of the plaintiff the same day, at Rs. 6 per maund.

2. The defendant delivered only 600 maunds of wheat and realized Rs. 3,600 from the plaintiff, but the said wheat was not the best Muzaffaranagar wheat, and was inferior to the aforesaid sample. He did not deliver the remaining 400 maunds within the aforesaid time, or at all.

Particulars of damage

	Rs.
Difference between the market price of wheat contracted for and of the wheat delivered, at 8 annas per maund, on 600 maunds	300
Difference between contract price and market price of contract wheat at Re. 1 per maund, on 400 maunds	400
Total ..	700

The plaintiff claims Rs. 700, with interest from date of suit to that of payment.

No. 144—Suit in respect of articles prepared to defendant's order (ww)

1. On December 14, 1925, the defendant verbally agreed with the plaintiff that the plaintiff should make for him a gold necklace of the following specification within one month, and that the defendant should pay for the said necklace on delivery thereof Rs. 1,000.

One necklace of 25 tolas of guinea gold, studded with 9 rubies weighing about 2 rattis each, and three diamonds,

(ww) The suit will be for damages unless the property has passed, or price was agreed to be paid on a fixed day irrespective of delivery, in which case the suit can be for price of the article. A prayer for re-

each weighing about $1\frac{1}{2}$ rattis, of the pattern as given in the sketch on page 35 of the catalogue of Labh Chand Moti Chand, Jewellers of Calcutta, for 1925.

2. The plaintiff made the necklace and, on January 10, 1926, offered to deliver it to the defendant and has ever since been ready and willing to do so.

3. The defendant has not accepted the said necklace or paid for it.

4. The plaintiff has in consequence suffered damage to the extent of Rs. 400.

The said necklace, as manufactured to the defendant's order, has no sale in the market and, on being melted, it would yield gold worth Rs. 400, and the rubies and diamonds can be sold for Rs. 200.

The plaintiff claims a decree for Rs. 400, with interest from date of suit to that of payment.

No. 145—Ditto

(Form No. 5, Appendix A, C. P. C.)

1. On the day of 19 , at E. F. of , agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that the said E. F. should pay for the same on the delivery thereof rupees.

2. The plaintiff made the said goods and, on the day of 19 , offered to deliver the same to the said E. F. and has ever since been ready and willing so to do.

3. That the said E. F. has not accepted the said goods or paid for the same.

No. 146—Suit for specific performance of a contract to sell goods (xx)

1. On November 14, 1925, at Kanpur the plaintiff

covery of price on the plaintiff being made to deliver the article is one for specific performance of a contract, and as specific performance cannot be granted when compensation in money is an adequate relief, it cannot be properly made.

(xx) Specific performance of a contract to sell movables cannot ordinarily be claimed, as the presumption is that breach of such con-

verbally agreed to purchase from the defendant, and the defendant agreed to sell and deliver to the plaintiff for the sum of Rs. 2,000 a certain old and rare book, being a manuscript copy of Firdausi's Shah Nama written in gold in the reign of Akbar.

2. The defendant failed to deliver the said book to the plaintiff within a reasonable time after November 14, 1925. On January 12, 1926, the plaintiff tendered the sum of Rs. 2,000 and demanded the said book from him, yet the defendant refused to deliver the said book to the plaintiff and still retains and withholds the same from him.

The plaintiff claims—

(1) Specific performance by the defendant of his contract to deliver the said book to the plaintiff, and Rs. 100 damages for the detention of the said book.

(2) In the alternative, Rs. 1,000 compensation for breach of the contract.

SALE OF LAND

No. 147—Suit by vendee for damage for breach of contract of sale and for specific performance (yy)

1. By an agreement in writing, dated August 1, 1924, the defendant contracted to sell to the plaintiff the land specified at the foot of the plaint, within three months, for a consideration of Rs. 4,000, and the same day the plaintiff paid to the defendant Rs. 400 as earnest money.

tract can be relieved by compensation in money (Sec. 10 Expln., Sp. Rel. Act, 1963). But if the goods are articles of unusual beauty, rarity or distinction or of special value to the plaintiff by reason of personal or family association or the like, the general presumption is displaced and specific performance can be claimed. The plaint must therefore show the special value of the property. The other requirements of a suit for specific performance are the same as that of a suit about immovable property for which see next note.

(yy) In case of breach of a contract by the defendant, the plaintiff may elect to put an end to the contract and sue for damages for such breach, or he may sue for specific performance and may claim compensation for the delay, or the two claims may be made in the alter-

2. The said land is close to the plaintiff's ginning factory and the plaintiff required it for extension of his factory, the season for which commences on November 15. The plaintiff had told these facts to the defendant and the time fixed was, therefore, intended by the parties to be of the essence of the contract.

3. The plaintiff was ready and willing to perform his part of the contract within the aforesaid time and, on November 14, 1924, tendered the balance of the consideration to the defendant but the defendant did not execute any instrument of transfer, whereby the plaintiff has lost the benefit of the purchase and has suffered damage.

If time was not the essence of the contract, substitute the following for paras 2 and 3 :—

2. The defendant was guilty of gross and unreasonable delay in performing his part of the contract after the aforesaid time and therefore notice in writing, dated December 1, 1924, was given by the plaintiff to the defendant personally (or was sent by registered post) requiring the defendant to com-

native (*Calcutta Improvement Trust v. Subarnabala*, 44 C. W. N. 541). When, however, a decree for specific performance is given, compensation is awarded only in exceptional cases when mere specific relief does not satisfy the justice of the case (*Venkatarama v. C. S. Ramaswami*, 93 I. C. 670, 1926 (Mad.) 173, 22 L. W. 786). Grounds for the additional claim of compensation, with particulars of the compensation claimed, should therefore always be given in the plaint. A prayer for possession may also be added, if necessary (*Chokalingam v. P. K. P. S. Pichappa*, 1926 (Mad.) 155, 92 I. C. 599). As specific performance is a discretionary relief and the court may refuse it even in second appeal (*Dayal Singh v. Mahabir*, 1930 (All.) 166), it is always better to add an alternative claim for damages in all such cases, as otherwise section 24, Sp. Rel. Act will bar a subsequent suit for damages. In every suit for specific performance or damages, **the plaintiff must allege the contract and its breach by the defendant and that he has performed his part of the contract, or is ready and willing to perform it.** Omission of an averment of readiness and willingness to perform it may lead to dismissal of the suit (*Madan v. Kamaldhari*, 1930 (Pat.) 121; *Tah Ah Boon v. Johore State*, 163 I. C. 417, 1936 (P. C.) 236). The averment is however, not necessary if the contract has been repudiated (*International Contractors v. Prasanna Kumar Sur*, 1962 S. C. 77). It is not necessary to allege in the plaint all the steps taken by the plaintiff to show his readiness, as they will be only evidence of such readiness. This

plete the said sale and receive the balance of the consideration from the plaintiff within a reasonable time, *viz.*, on or before December 15, 1924.

3. The defendant has not completed the sale, whereby the plaintiff has lost the benefit of the purchase and has suffered damage. Or,

2. The plaintiff has, on November 14, 1924, and again on November 25, 1924, requested the defendant specifically to perform the said contract on his part, but the defendant refused and has failed to do so, whereby the plaintiff has suffered damage.

3. The plaintiff has been and is still ready and willing specifically to perform the agreement on his part, of which the defendant had notice.

Particulars of damage by non-performance of contract

	Rs.
Difference between the contract price and the price when default took place	500
Interest on Rs. 400 paid, and Rs. 3,600 provided by the plaintiff for payment, to the defendant, at 1 per cent per mensem, from August 1, and November 14, respectively upto date	172

practice of alleging, in suits for specific performance, that the plaintiff went to the Registration office with the purchase money, or that he purchased the stamp paper and got the sale-deed written out, is not, therefore correct. If the plaintiff's readiness and willingness is disputed then all these facts may be proved by him at the trial and indeed every fact necessary to establish his readiness must be proved by plaintiff (*Abdulla v. Tenenbaum*, 1933 A. L. J. 1570 p. c.). The Calcutta H. C. has held that the readiness should be to perform the contract as it actually was and not as he alleges it was and dismissed a suit when the plaintiff had alleged the price to be Rs. 85- and that he was willing to pay that price but the Court found the price to be Rs. 130- (*Rustomali v. Shaikh Alides*, 45 C. W. N. 837). But where the plaintiff after disputing the amount left to the Court and expressed willingness to make such payment as may be fixed by the Court, it was held to be sufficient averment of readiness (*Arjan v. Lakshmi Ammal*, 1949 Mad. 265, 1942-2 M. L. J. 271, 1948 M. W. N. (624)). In case of a breach of contract to purchase or sell immovable property, the time fixed for completion of the contract is not generally of the essence of the contract. But where it is, as when

Particulars of damage for delay in performance

Rent paid by the plaintiff for similar land taken by him on lease, for months, at per mensem.

The plaintiff claims—

(1) That the court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said land.

(2) In case specific performance is decreed, Rs. compensation for withholding the performance.

(3) In the alternative, Rs. 672 as damages for non-performance of contract and re-payment of Rs. 400 paid as deposit by the plaintiff.

(4) Interest from date of suit to that of payment.

No. 148—Suit for specific performance.

(Form No. 47, Appendix A, C. P. C.)

1. By an agreement, dated the day of and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of rupees.

the property is of a fluctuating or diminishing character or, purchase was made for a particular object, the promisee may sue after the last day fixed for performance, and it is sufficient to allege his readiness to complete the contract on such day. It is not necessary to allege his readiness at any time after that day, or to make demand of performance. **But the fact that time was of the essence of the contract should be alleged.**

If no time was fixed for the performance of the contract, or if time fixed was not of the essence of the contract, **the plaintiff must allege his readiness to perform his part of the contract within a reasonable time, and must allege a demand of performance within a reasonable time.** Ordinarily time is not of the essence of a contract of sale of land (*Jamshed v. Burjorji*, 14 L. A. J. 225, 23 C. I. J., 358, 20 C. W. N. 744, 40 B. 289, 30 M. L. J. 186, 18 Bom. L. R. 163, 32 I. C. 246 (P. C.); *Kalu v. Narayan*, 100 I. C. 578, 29 Bom. L. R. 56; *Subedar Dubey v. Madho Dubey*, 1953 A. L. J. 121). Where in such cases, there has been great and improper delay in the performance, the other party has a right to fix a reasonable time within which the contract is to be performed and a distinct notice by him that he will consider the contract at an end, if not completed within such time, is binding (*Compton v. Bagley*, 1 Ch. D. 313).

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been, and still is, ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

The plaintiff claims that the court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [*or* to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 149—Suit for specific performance

(Form No. 48, Appendix A, C. P. C.)

1. On the day of 19 , the plaintiff and defendant entered into an agreement in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immovable property described in the agreement.

If, however, the defendant has definitely refused to perform the contract, or has shown such refusal by his conduct, *e. g.*, by selling the property to another person, the plaintiff need not prove any performance of his part of the contract and need not allege any readiness to perform it (*Srilal v. Hari Ram*, 88 I. C. 784, 1926 (Cal.) 181). But vendor's leasing the property to raise money for a suit for specific performance is not such a conduct (*Ramakrishnayya v. Sheeramulu*, 1939 (Mad.) 547).

It must be remembered that though the plaintiff may claim the same damages in the alternative as he could in a suit for damages for breach of contract, yet the measure of damages in awarding compensation to a plaintiff in case the court refuses specific performance is not necessarily the same as that in a suit for damages for breach of contract in which no specific performance is claimed. In the former, the amount of compensation is entirely in the court's discretion. The damages, or compensation, as they should be more properly called, claimed as an alternative in a suit for specific performance are allowable only when the court refuses specific performance, and it has been held in Bombay that a plaintiff cannot abandon his prayer for specific performance and ask the court to allow him damages on the same measure as he could claim if he had not originally chosen to sue for specific performance of the contract, for, when he is not himself prepared to have specific performance, he cannot have suffered any damage by the defendant's re-

2. On the day of 19 , the plaintiff tendered rupees to the defendant and demanded a transfer of the said property by a sufficient instrument.

3. On the day of 19 , the plaintiff again demanded such transfer [*or* the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer.

The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

The plaintiff claims—

(1) That the defendant transfer the said property to the plaintiff by a sufficient instrument (*following the terms of the agreement*).

(2) rupees compensation for withholding the same.

fusal. Even if the court does not entirely dismiss the suit in such cases, it will take into consideration the plaintiff's abandonment of his claim in awarding him compensation. In *Flora Sassons Case*, their Lordships of the P. C. on appeal deprecated the action of the trial court in allowing the plaintiff to amend his plaint so as to make his claim one for damages *Simpliciter*, but as the suit was dismissed by their Lordships on another ground they did not decide whether the plaintiff could change his claim from one for specific performance and compensation to one for simple damages, but observed that although the court has got wide powers to allow such an amendment, yet it should be exercised only in a proper case and under suitable conditions (*Ardeshar v. Flora Sasson*, 32 C W. N. 353, 30 Bom. L. R. 1242, 55 M. L. J. 523, 55 I. A. 360, 1928 (P. C.) 208, *See also Ram Saran v. Mahabir*, 25 A. L. J. 74 (P. C.)). The Allahabad High Court in a later case after considering the Privy Council ruling in *Ardeshar's* case held that in the circumstances of the case before it the plaintiff should be allowed to withdraw the claim for specific performance and should be granted a decree for refund of the price paid by him with interest, as defendant had in no way suffered by the suit (*Jaggo Bai v. Harihar Prasad*, 1940 (All.) 41, 1939 A. L. J. 1107, 1939 A. W. R. (H. C.) 821). In another case, where the contract of sale was made by one of several co-sharers of the property and the plaintiff abandoned the prayer of specific performance on the ground, that other co-sharers refused to sell their shares, the Lahore High Court allowed the alternative claim for damages (*Mangal Singh v. Dial Chand*, 1940 (Lah.) 159, 188 I. C. 383). In a Madras case the plaintiff who had sued for both reliefs was permitted to abandon the claim for specific perfor-

No. 150—Suit by a vendor for specific performance of a contract to purchase land or for damages

1. By an agreement in writing, dated October 16, 1920, the defendant agreed to purchase the plaintiff's share in the zamindari of village—from the plaintiff for Rs. 20,000. The defendant paid Rs. 500 as earnest money to the plaintiff and, by the said agreement agreed that the sale should be completed, and the balance of the purchase money paid, on December 16, 1920.

mance as the price of shares had fallen since the institution of suit and defendant was also not able to deliver the shares he had contracted to sell (*Alagappa United Brokers*, 1948 Madras 216, 1947-2 M. L. J. 260). In another case when specific performance was rejected as Govt. had acquired the land, permission to amend the plaint by praying for damages was refused in appeal on the ground that proceedings for acquisition were pending when plaintiff filed his suit yet he chose to sue only for specific performance (*Mahammad Abdul Jabbar v. Lalmia*, 1947 Nag. 254). The plaintiff should therefore decide before instituting the suit whether it would be more profitable to take the property or to sue for damages only.

But compensation can be awarded only when specific performance can be enforced but Court in its discretion does not grant it and not in cases when specific performance cannot be enforced under the law *e. g.* when Section 14 bars specific performance (*A. J. Ram v. Asiatic & C.*, 19 MYS. L. J. 1).

The proper decree to be passed in a suit for specific performance of a contract of sale of land, when the same has subsequently been sold to a third party is to direct specific performance of the contract between the vendor and the plaintiff and direct subsequent transferee to join in the conveyance, *Lala Durga Prasad v. Lala Deep Chand*, 1954 A. L. J. 73 (S. C.) If the subsequent transferee has not got all the properties under his transfer and there is a dispute on the point both the vendor and the subsequent transferee should be ordered to execute the conveyance (*Mathai Thomman v. Thomas Mathew*, A. I. R. 1952 T. C. 199) while it is pleaded in the written statement that the plaintiff induced a belief in the defendants that the contract to sell the property had been abandoned or would not be enforced and that the defendants had changed their position by reason of such belief and no third parties have acquired any rights in the property and the defence simply is that the plaintiff is not entitled to relief by reason of the delay in the institution of the suit that would not be enough to disentitle the plaintiff to the relief of specific performance. Mere delay does not by itself preclude the plaintiff from obtaining specific performance nor could waiver or abandonment of rights be inferred merely from delay in the institution of the suit. Specific performance of a transaction which was for proper consideration when it was entered into could not be refused

2. On the said October 16, 1920, the plaintiff had told the defendant that he was required to pay Rs. 20,000 under a pre-emption decree on December 16, 1920, and the said December 16, 1920, was fixed by the parties with reference to this obligation of the plaintiff, and was of the essence of the contract.

3. The plaintiff was ready and willing, on the date fixed, to execute a proper deed of sale on receiving the balance of the purchase money, and had called upon the defendant to perform his part of the contract and to pay the balance of

on the ground that at the time of the suit the value of the property had considerably risen. The validity of the transaction should, on principle be judged as on the date of the transaction. (*Sankaralinga Nadar v. Ratnaswami Nadar*, A. I. R. 1952 Mad. 399).

Specific performance would be refused if the plaintiff was not ready and willing throughout to perform his part of the contract. Such readiness must continue to the date of decree. (*Dalmia Jain & Co. v. Kalyanpore Lime Works Ltd.*, A. I. R. 1952 Pat. 393).

It is incontestable that in a suit for specific performance of contract for the sale of land it is open to the plaintiff to join in the same suit two prayers, one for the execution of the decree of transfer and another for recovery of possession of the land in question. The right to recover possession springs out of the contract which is specifically enforced. Such a right does not arise merely as a result of the execution and completion of the conveyance. (*Kartik Chandra Pal v. Dibakar*, A. I. R. 1952 Cal. 362).

If a contract for sale of land is concluded between a vendor and a purchaser without any express stipulation as to the warranty of good title, and the vendor, before the conveyance is executed, expresses his inability to give such a warranty, the court in a suit for specific performance of such a contract is entitled to pass a decree for specific performance even though it is unable to hold that the refusal by the vendor was mala-fide and invented only as an excuse to back out of the transaction. The mere refusal on the part of the vendor to give such a warranty does not in this case disentitle the plaintiff to a decree for specific performance. (*Deep Chandra v. Nawab M. S. Ali Kishen*, 1951 A. L. J. 81 (F. B.)).

The relief for specific performance, is discretionary with the Court but there must be willingness on the part of plaintiff to perform his part of contract *Ramesh Chandra Chandisk v. Chunni Lal* A. I. R. 1971 S. C. 1238. the Supreme Court has also held that mere delay is not sufficient to deny specific performance. At the same time laches reaching upto waiver or abandonment are not required for denial. The relief should be denied if unequitable. (*Madan Setty v. Lalloji Rao* A. L. J. 1965 S. C. 1405).

the purchase money on the date fixed, but the defendant did not do so (*or*, the defendant, on December 14, 1920, refused to purchase the property and to pay the balance of the purchase money).

A contract entered into by the guardian of a minor cannot be specifically enforced against the minor, even though the guardian in part performance of the contract to sell has placed the vendee in actual possession (*Mova v. Mondava*, 110 I. C. 492, 1928 (Mad.) 830; *Mir Sarwar Jan v. Fakhruddin*, 39 C. 232, 9 A. L. J. 33, 39 I. A. 1, 13 I. C. 331, 14 Bom. L. R. 5; *Monobardas v. Tarini*, 34 C. W. N. 135, 1929 (Cal.) 612); (*Singara v. Ibrahim*, 1947 Mad. 94, 1947 M. W. N. 463 1947-2 M. L. J. 103) nor can the minor be sued for damages for breach (*Krishna Chandra v. Seth Rishabha*, 1939 (Nag.) 265). A contract by manager of a joint Hindu family having a minor member can be enforced as against the minor if it was a contract of sale for necessity (*Ramchandra v. Sundaramurthi* 4 M. L. J. 9 (2); *Krishna Aiyar v. Shamanair*, 28 M. L. J. 610 (617), 17 I. C. 497; *Adinarayan v. Venkatasula*, 1937 Mae. p. 69; *Haricharan v. Kamla*, 1917 Pat. 478, 40 I. C. 42; *Mst. Dhopo v. Ram Chandra*, 1934 All. 1019, 154 I. C. 235). Contra (*Nirpendra v. Ekharali*, 57 C. 268, 34 C. W. N. 272). But there is nothing illegal in a minor being transferee of property and a minor who has paid the consideration and obtained a transfer, *e. g.*, a mortgagee can enforce the transfer (*Zafar Absan v. Zubaida*, 27 A. L. J. 1114). What contracts can and what cannot be specifically enforced, and by whom and against whom such performance can be claimed, is laid down in the specific Relief Act (Secs. 15—19). But a suit for damages for breach of a contract always lies, and the measure of damages is generally the difference between the contract price and the current market price. Where in a suit for specific performance of a contract to sell shares plaintiff had claimed damages in the alternative but afterwards abandoned the former and confined his case to the latter, it was held that the damages should be the difference between contract rate and rate on the date of filing the plaint and not the date on which the plaintiff abandoned his claim for specific performance (*United Brokers v. Alagappa*, 1948 Mad. 391, 1948-1 M. L. J. 178, 1948 M. W. N. 182.) Any costs incurred in making preparations for completing the contract, *e. g.*, in investigating title, purchasing stamp-paper, or procuring money to be paid for consideration, unless procured prematurely, may also be claimed. Interest on deposit or earnest money also be claimed as damages. Remote damages, such as for the loss of use to which the plaintiff might have applied the money cannot be claimed, unless the defendant had previous notice. The seller may retain the deposit money, if the buyer is in default (*Bishen Chand v. Radha Kishen*, 19 A. 489; *Fazal Ahmad v. Rajendra*, 1926 (Cal.) 339, 93 I. C. 195; *S. V. Vipper v. Sevat Ram*, 101 I. C. 686), but must give credit for it in the damages claimed for breach of contract (*Mangal Sen v. Mali Singh*, 164 I. C. 317, 1936 (All.) 566; *Copaldas v. The Municipality, Hyderabad*, 1940 Sind 1). But if the deposit is not intended to be in the nature of a security for the

[Or, if time was not of the essence of the contract—

2. The plaintiff, on December 14, 1920 and again on December 16, 1920, told the defendant that he was willing and ready to execute a deed of sale, and called upon the defendant to perform his part of the contract and to pay the balance of the purchase money, but the defendant did not

performance of the contract it cannot be forfeited (*Pasumarti v. Thamman-dra*, 1926 (Mad.) 117, 91 I. C. 765). It has been held by the Privy Council that earnest money is part of purchase money when the transaction goes forward, but it is to be forfeited when the transaction falls through owing to vendee's fault (*Kummar Chiannjit Singh v. Har Sarup* 24 A. L. J. 248, 94 I. C. 782, 1926 (P. C.) 1, 3 O. W. N. 168, (1926) M. W. N. 145, 50 M. L. J. 629; *Krishna Chandra v. Khan*, 161 I. C. 166, 1936 (Cal.) 51; *Sevanna v. Panna*, 99 I. C. 629; *Murlidhar v. International Film Co.*, 1943 P. C. 34. The fact that there is no forfeiture clause about earnest money in the agreement is immaterial, so the fact that it is described as earnest money or as part payment of the price, and so the proportion earnest money bears to the whole price (*Bhalchandra v. Malindeo*, 1947 Nag. 193). The real intention of the parties is to be seen. (*Nagar Mahapalika v. Sardar Karamjeet Singh* 1967 A. L. J. 126.) Compensation should be fixed in the same way as damages under S. 73, Contract Act (*Pratapchand v. Raghunath Rao*, 169 I. C. 887, 1937 (Nag.) 243.) If any compensation is stipulated in the contract itself to be payable in case of breach, no sum in excess of it can be recovered, but the court can grant any compensation upto that limit, whether any actual damages have been incurred by the plaintiff or not (Sec. 74, Contract Act) but the plaintiff cannot claim the amount of his actual loss (*Bhai Panna Singh v. Fore*, 27 A. L. J. 791). If the plaintiff has not suffered any damages but some injury not assessable in money he can get *nominal* damages on showing the injury, and if damages are apprehended court can assess them and award them as prospective damages (*Ram Chandra v. Chinubhai* 1944 (Bom.) 76). If a vendor has undertaken to discharge an encumbrance, a vendee plaintiff may pray in the suit for specific performance that the vendor should be ordered to discharge the encumbrance before he is allowed to take away the consideration money (*Katha v. Subramania*, 94 I. C. 561, 1926 (Mad.) 569, 50 M. L. J. 228, (1926) M. W. N. 271).

Parties : A plaintiff in a suit for specific performance may implead a transferee of the property as a defendant, but the suit cannot be decreed against him, if he is a *bona fide* transferee for consideration without notice of the plaintiff's contract. It is for the defendant to prove this, (*Shankar Lal v. Narayan Das*, 1946 P. C. 97, 50 C. W. N. 603; *Himmat v. Vasudeo*, 36 B. 446; *Sankeli v. Mahanaya*, 1934 (Pat.) 518; *Baburam v. Madhab Chandar*, 40 C. 565; *Naubat Raj v. Dhonkal*, 38 A. 184, 14 A. L. J. 111; *Imam Uddin v. Mahammad Din*, 1926 (Lah.) 136, 89 I. C. 422; *Haroon v. Tabir*, I. L. R. (1940) Kar. 406) and the plaintiff need not therefore allege notice in the plaint. It is also necessary to protect the transferee to show that he had paid the consideration before he

do so (or refused to perform his part of the contract on December 14, 1920).

3. The plaintiff is still ready and willing to perform his part of the contract.]

4. By reason of the default of the defendant the plaintiff has suffered damage.

had notice of the previous contract (*Arunchala v. Madappa*, 1936 (Mad.) 949). For the rights of a transferee in the notice See *Jhadoo v. Ramesh Chandra* A. I. R. 1971 All. 189. If a small portion of consideration was paid before notice and bulk after notice of the previous contract the transferee cannot be said to be *bona fide* (*Gauri Shankar v. Ram Sewak*, 1934 (All.) 1045, 1934 A. L. J. 871, 152 I. C. 39). If his transfer is incomplete *e.g.* his sale-deed is unregistered suit will be decreed against him even if he took, without notice as he is not a 'transferee' (*Loknath v. Wahab*, 1930 (Pat.) 81). If a plaintiff obtains a decree against the vendor alone, he cannot, after his right of specific performance is barred by limitation, sue a subsequent purchaser with notice for possession after the vendor has executed a sale-deed in his favour (*Gauri Shankar v. Ibrahim*, 116 I. C. 70, 1929 (Nag.) 298). But a suit cannot be decreed against a subsequent transferee who has a right of pre-emption against the plaintiff (*Dayal Singh v. Mahabir*, 1930 (All.) 166). The interest of a person in whose favour a contract to sell land is made is assignable and the assignee can, therefore, claim specific performance (*Chinna v. Sagalaguna*, 100 I. C. 399, 49 M. 387, 1926 (Mad.) 699, 51 M. L.J. 229 and cases cited in this ruling). One of the co-contractors can sue for specific performance, impleading the others as *pro forma* defendants (*Jagdeo Singh v. Bishwambhar*, 171 I. C. 654, 1937 (Nag.) 186). In some cases a stranger to contract can also sue See Sec 23 Specific Relief Act and A. I. R. 1965 Pat. 262. A subsequent purchaser's possession is not wrongful, until the plaintiff obtains a sale-deed in his favour in execution of a decree for specific performance, even if he had purchased with notice of the previous contract in plaintiff's favour. He is not, therefore, liable for mesne profits. (*Narsingappa v. Tuppanna*, 164 I. C. 152, 1936 (Bom.) 276). A person claiming adversely to the vendor is not a necessary party where property stands in the name of a person other than the vendor but he may be joined as a proper party on the allegation that he is *benamidar* for the vendor. If such person denies this, the matter cannot be adjusted in this suit but he must be discharged and if plaintiff obtains a decree against the vendor he can institute a suit against such person after having a conveyance executed in his favour in execution of the decree (*Prem Sundar v. Habibulla*, 1945 (Cal.) 355; *Mt. Nagi v. Damodhar*, 1948 Nag. 181).

Court fees : A suit for specific performance of a contract of sale should be valued, both for purposes of jurisdiction as well as court-fee, at the amount of the consideration.

Limitation : Three years from the date fixed for performance, or if no such date is fixed, from the date when plaintiff has notice that

Particulars of damage

Difference between the contract and market price.....
Rs. 4,000.

Interest on Rs. 19,500 which the plaintiff borrowed from
the Allahabad Bank to pay up the pre-emption decree, at
6 per cent per annum Rs. 390

performance is refused by the defendant (Art. 54). In the absence of either of these dates, limitation of three years runs from the date when the plaintiff can demand specific performance, or when the defendant is in a position specifically to perform his contract (*Venkanna v. Venkata*, 41 M. 18).

Defence : Defendant may plead that he was ready and willing to perform his part of the agreement and the plaintiff himself committed default and is not therefore entitled to damages or specific performance, or he may plead, in a suit for specific performance, that the plaintiff has already got compensation for the breach, or that the contract had, by mutual agreement, been rescinded. The defendant may show that the plaintiff has no title to the property he agreed to sell. If the seller is a Hindu father having minor sons of whose existence defendant did not know the defendant can plead that the title agreed to be conveyed by the father was imperfect (*Ratan Singh v. Manik Ram*, 109 I. C. 183, 1927 (Sind) 219, 20 S. L. R. 200; *Valabh Das v. Tulsidas*, 1921 (Bom.) 334). When a manager of joint family agreed to sell without necessity and other members were not made parties and the plaintiff refused to purchase manager's share for the whole consideration then suit was dismissed (*Gulam Nabi v. Kishin Chand*, 1949 Sind. 18). Any other plea which can be urged against the specific performance under the Specific Relief Act may be urged in a suit for specific performance. It is no defence that the agreement provides damages in case of breach (*Metta Rama v. Metta Ammaya*, 1926 (Mad.) 144, 49 M. L. J. 117, 90 I. C. 551; *Contra Monfar v. Dewan Rawsan*, 1943 (Cal.) 586), but where in such a case the plaintiff had on hearing of the vendor's intention to sell the property to another person, given notice to such person that he would claim damage; specific performance against such person was refused (*Daya Ram v. Karmumal*, 1937 Sind. 263). Inadequacy of price is no defence (*Bani Madho v. Ramnath*, 1941 (Oudh) 324, 194 I. C. 533), nor any other hardship to the defendant (*Ram Sundar v. Kali Narayan*, 104 I. C. 527 Cal.) It is no defence that the contract provides for payment of a specific amount to be paid as damages in case of breach (*V. K. Kandasami v. Shammugha*, 1949 Mad. 302, 1948-2 M. L. J. 350). If a subsequent purchaser with notice has also been impleaded he may claim any sum he may have spent in discharging a prior encumbrance on the property (*Nasir Uddin v. Ahmad Hassan*, 97 I. C. 543, 1926 (P. C.) 1091, 1926 (M. W. N.) 812). If the suit is otherwise valid it is no defence that plaintiff had other remedies which he has allowed to become time-barred (*Sobanlal v. Atalnath*, 1933 A. L. J. 1584, 1933 (All.) 846). The execution of the sale-deed in pursuance of the agreement would be no defence if

The plaintiff claims--

(1) That the court will order the defendant to pay Rs. 19,500 to the plaintiff and to accept a sale-deed from the plaintiff on the terms mentioned in the said agreement.

(2) Rs. 390, damages for withholding performance of the contract.

(3) In the alternative, Rs. 4,390 damages.

(4) Interest from date of suit to that of payment.

No. 151—Suit against a vendor for refund of purchase money on ground of latter's defect of title (zz)

1. On June 3, 1957, the defendant executed a sale-deed in favour of the plaintiff in respect of the house therein described and referred to for a consideration of Rs. 9,000,

the sale-deed required registration but was not registered and was taken out of the vendee's control, so that the vendee could not have it compulsorily registered (*Mohammad Akram v. Mula Singh*, 1925 (Lah.) 30, 89 I. C. 414). A suit for specific performance is not barred even if the plaintiff could bring a suit for compulsory registration of a sale-deed which had been executed by the defendant (*Amir Chanda v. Nathu*, 7 A. L. J. 887, 7 I. C. 408; *Surendra Nath v. Gopal Chandra*, 12 C. L. J. 464, 8 I. C. 794; *Nasir Uddin v. Sidhu*, 27 C. L. J. 538, 44 I. C. 361). But the Madras High Court has taken a different view and has held that if the plaintiff has failed to avail himself of the remedy of a suit under Section 77, Registration Act, he cannot bring a suit for specific performance (*K. Satyanarayana v. Y. Chinna*, 100 I. C. 365, 1926 (Mad.) 530, 50 M. L. J. 674, 49 M. 302, 23 L. W. 277). Long delay in institution of suit and gross negligence of plaintiff may be pleaded (*Shiam Bahadur v. Madan Singh*, 1945 (All.) 293; *Khushi Ram v. Munshi Ram*, 1940 (Lah.) 225, 189 I. C. 418), mere delay, however is no defence unless it is shown that the claimant knew that the other party is altering his position in the belief that the claimant has abandoned his claim and even then the claimant does nothing (*Mohd. Wazir v. Jahangirmal*, 1949 Lah. 72), or it can be inferred that plaintiff had abandoned his right or it can be shown that on account of the delay there has been such change of circumstances that grant of specific performance would prejudice the defendant (*Arjuna v. Lakshmi Ammal*, 1949 Mad. 265, 1948-2 M. L. J. 271, 1948 M. W. N. 624).

(zz) In all such cases the question of limitation is always a serious question and should be carefully studied before the plaint is drafted. Such claim may be for damages for breach of an express or implied contract for good title and quiet enjoyment, or for refund of money paid for a consideration which has failed, or for money had and received by the vendor for the use and benefit of the vendee.

which the plaintiff paid in cash, and put the plaintiff in possession.

2. One Mt. Shirin Begum, a sister of the defendant, instituted a suit against the plaintiff (being suit No. 323 of 1958) in the court of the Subordinate Judge at Monghyr for recovery of a one-third share in the said property on the allegations that the house had belonged to her father and that she inherited a one-third share in it.

The suit can always be filed as one for damages for breach of contract, the limitation for which is 3 years (Art. 55). In the case of an implied contract for good title which is always read into every conveyance by virtue of Section 55 (2) Transfer of Property Act, limitation runs from the date of the sale (*Ganapa v. Hammad*, 49 B. 596). But if the vendee obtains possession under the sale-deed the limitation runs from the date of his dispossession (*Secretary of State v. Venkayya*, 40 M. 910; *Muhammad Sidiq v. Muhammad Nub*, 124 I. C. 185 All.). In the case of an express contract, for instance, when there is a clause in the sale-deed that the vendor would refund the price in case of the vendee's dispossession by one having superior title, limitation would run from dispossession as that would amount to a breach of the contract (*Ram Dularay v. Hardwari Lal*, 40 A. 605).

If the sale is void *ab initio* for example, when the vendor has no title whatever or where both parties were under a mistake that the vendor has title as in *Rani Kanwar v. Mahboob*, (1930 A. L. J. 327, 1930 (All.) 252), and the vendee does not obtain possession, the suit for refund of price will be governed by Art. 62 (now 24) and limitation will run from the date of sale (*Ardesir v. Vajesing*, 25 B. 593; *Ratan Bai v. Ghasiram*, 134 I. C. 1157, 33 Bom L. R. 1094, 55 B. 565). The Allahabad High Court in such a case applied Art. 97 (now 47), (*Hans Ram v. Chhotey*, 171 I. C. 923, 1937 (All.) 689) and when the plaintiff's claim for possession was decreed by lower court and was dismissed in appeal, held that time began to run from the date of Appellate Court judgment (*Munalal v. Nanhi*, 103 I. C. 385). In a suit framed as one for damages Madras High Court applied Art. 116 (now 55) and held limitation to run from the date of dismissal of plaintiff's suit for possession (*Thillaikannu v. Abdur Kadir*, 140 I. C. 805, 1933 M. W. N. 649, 64 M. L. J. 336, 1933 Mad. 126) and the Rangoon High Court also applied Art. 116 (now 55) but held the date of sale to be the starting point of limitation (*P. L. A. V. N. K. Chettyar Firm v. Adinmanlagi*, 167 I. C. 809, 1937 (Rang.) 39).

If the sale is voidable and the vendee has not obtained possession Art. 97 (now 47) would apply and limitation would run from the date when the vendee is obstructed in obtaining possession (*Hanuman v. Hanuman*, 19 Cal. 129; *Tulsiram v. Murlidhar*, 26 B. 750). There is no fresh start of limitation by any subsequent efforts of the vendee to obtain possession through court and therefore if the vendee brings his suit for possession and the suit is dismissed he does not get a fresh limitation from the dismissal of the suit.

3. The plaintiff defended the said suit but it was decreed on January 4, 1959 and in execution of the said decree, the plaintiff was deprived of possession of a one-third share in the said property on March 8, 1959.

The plaintiff therefore prays for a decree for Rs. 3,000, being the proportionate consideration of the sale-deed of the defendant in respect of the one-third share lost by the plaintiff.

If, however, in either case, *i. e.*, whether the sale is void or voidable, the vendee obtains possession and is subsequently dispossessed he can sue for refund of his money within three years provided by Art. 97 (now 47) from the date of his dispossession (*Abdul Rahim v. Kadu*, 118 I. C. 203 Sind.) or, if the dispossession is made through court, from the date of the adverse order against him. The Patna High Court has applied Art. 116 (now 55) to such cases (*Debi Prasad v. Haji Syed*, 1940 (Pat.) 81, 18 Pat. 654). If dispossession has been made through court, actual dispossession in execution of the adverse order will not give a fresh start for limitation, nor will an appeal from such adverse decision (*Siga Mani v. Minibadra*, 1926 (Mad.) 255; *Juscurn v. Prithi Chundra*, 46 C. 670, 17 A. L. J. 514).

If a suit for damages for breach of contract is barred but a suit for refund of price under Art. 97 (now 47) is not, there is no objection to the plaint being drafted as one under Art. 97 (now 47) or the plaintiff may even claim damages or refund of price alternatively under Art. 116 or 97 (now 55 or 47). When the sale-deed was registered, the longer period of six years provided by Art. 116 could be availed of (*Abdul Rahim v. Kadu*, 118 I. C. 203; *Mt. Lakhpatt Kr. v. Durga Prasad*, 117 I.C. 654, 1929 (Pat.) 388, Pat. 432; *Babu Ram v. Amba Prasad*, 1946 (All.) 159 but now under Art. 55 the distinction between registered and unregistered contracts has been done away with.

In case of breach of contract the plaintiff can recover damages and not only refund of price. According to the Bombay and Allahabad High Courts, therefore, the purchaser can recover the value of the property on the date of his eviction even if it exceeds the price paid by him (*Nagar Das v. Ahmad Khan*, 21 B. 175; *Ram Singh v. Sajan*, 101 I. C. 704, 1927 (Sindh) 120; *Muhammad Sidiq v. Muhammad Nuh*, 124 I. C. 185). The Nagpur Court has, however, held that in such a case a vendee can recover only the value on the date of his purchase (*Zingaraji v. Nagosa* 99 I. C. 313). This latter view is based on a narrow interpretation of Section 73, Contract Act, which it is submitted, is not justified.

If the vendor has committed a fraud, for example by previously selling the property to another, the vendee is entitled to avoid the sale and claim refund of the price in spite of a clause in the sale-deed that the vendor would not be liable for any defect in his title (*Akhtar Jahan v. Hazari Lal*, 103 I. C. 310 All.).

If the contract of sale is void as being in contravention of any Act

**No. 152—Suit for refund of price of auction
purchase when J. D. had no saleable
interest (aa)**

1. The plaintiff obtained a decree No. 213 of 1906 against one Chatrapat Singh from the Court of the Subordinate Judge at Murshidabad, and, in execution thereof certain properties detailed in Schedule 'A' attached to the plaint were sold in different lots and were purchased by the plaintiff on November 19, 1907, for a total sum of Rs. 14,050 which the plaintiff paid in cash into the court.

2. Sheoraj deceased, father of the defendant, had also obtained a money decree against the said Chatrapat Singh (being decree No. 403 of 1906) and had applied for rateable distribution of the sale-proceeds realized in execution of the plaintiff's decree, and, under an order of the court, obtained Rs. 2,800 out of the money in deposit, on February 15, 1908.

3. Mt. Mina Kumari, wife of the said Chatrapat Singh, brought a suit in the court of the Subordinate Judge at Murshidabad for declaration of her title to a portion of the said property, *viz.*, to the property detailed in Schedule 'B' attached to the plaint, and made Chatrapat Singh also a defendant, and her suit was decreed on appeal to the Privy Council on December 11, 1916, and therefore the said Chatrapat Singh was held to have no saleable interest in the said property and the said Mt. Mina Kumari took possession of the said property on September 29, 1917.

of Legislature a refund of the price cannot be claimed (*Sada v. Hayat*, 109 I. C. 633 Lah.).

(aaa) Such a suit by an auction purchaser against the decree-holder does not lie according to the Allahabad, and Calcutta High Courts (*Ram Sarup v. Dalpat*, 58 I. C. 105, 43 A. 60, 18 A. L. J. 905; *Amar Nath v. Firm Chotey Lal Daya Prasad*, 1938 A. L. J. 95 F. B. *Rishikesh v. Manik*, 96 I. C. 64, 53 C. 758, 43 C. L. J. 418, 1926 (Cal.) 971). A full Bench of the Oudh Chief Court (one Judge dissenting) has however, held that such suit would lie (*Bahadur Singh v. Rampal*, 124 I. C. 641, 7 O. W. N. 232, 1930 (Oudh) 148). The same view has been taken by a full Bench of the Rangoon High Court (*Maung Aye v. A. Scott*, 1940 (Rang.) and also by the East Punjab H. C. (*Amolok Chand v. Md. Shafi*,

4. The said property mentioned in Schedule 'B' had been sold for Rs. 13,295, and the rateable sale-proceeds which the defendant's father Sheoraj received out of this amount of Rs. 13,295 was Rs. 2,650.

5. The said Sheoraj died in 1918, and the defendant is his son and only heir.

The plaintiff claims a decree for Rs. 2,650, with Rs. 477, on account of interest at 6 per cent per annum from the date of plaintiff's dispossession to the date of suit, with future interest upto the date of payment, against the assets of Sheoraj in the hands of the defendants.

No. 153—Suit for refund of price by vendee deprived of possession owing to vendor's fraud

1. On April 4, 1924, the defendant executed a sale-deed in favour of the plaintiff in respect of Zamindari property therein described, for a consideration of Rs. 8,000, which the plaintiff paid in cash, and put the plaintiff in possession.

2. One Ram Lal obtained a decree for possession of the said property against the plaintiff (being decree No. 100 of 1926) from this Court on the basis of a sale-deed executed in his favour by the defendant on April 1, 1924, and in execution of the said decree obtained possession of the said property on October 25, 1926.

3. The plaintiff had, at the time of his purchase, no knowledge of the sale-deed in favour of Ram Lal.

1948 East Punjab 1); and also by a Full Bench of the Madras High Court (*Nacha v. Kattara*, 1936 (Mad.) 50, 159 I. C. 625) and Rajasthan High Court (*Thakurlal v. Nathulal*, 1964 Raj. 140); but when the defect was not in the entire property but the judgment-debtor was found to have no title in a part of the property, no suit lies according to the Madras High Court (*Firm Narasingi v. Suryaderara*, 1945 (Mad.) 363). Such a suit must be brought within six years provided by Art. 120 (now 3 years under Art. 113) from the date of decree or order declaring that judgment-debtor had no saleable interest, the date of plaintiff's disposition being immaterial, (*Amolok Chand v. Md. Shafi*, 1948 East Punjab 1; *Makar Ali v. Surfudd in*, 50 Cal. 115, 1923 (Cal.) 95, *Nilkanta v. Imam*, 16 M. 361 and *Sideshwari v. Mayanand*, 35 All. 419). In *Bijraj v. Raja Bejoy*, 1926 Cal. 297.) it was agreed by parties that Art. 97 applied and that Court did not decide this. In *Mylavaram v. Penukonada*, 1947 (Mad.)

The Plaintiff claims—

- (1) Refund of Rs. 8,000.
- (2) Rs. 200 on account of interest thereon from October 25, 1926 to date of suit at 1 per cent per mensem by way of damages.
- (3) Interest from date of suit to that of payment.

No. 154—Suit for unpaid purchase money, by enforcement of charge (bbb)

1. By a sale-deed of June 14, 1921 executed by the plaintiff and registered on June 26, 1921, the plaintiff sold the property specified at the foot of the plaint to the defendant for a consideration of Rs. 10,000 and put the defendant in possession.

2. Out of the consideration the defendant paid Rs. 6,000 at the time of registration of the sale-deed, and verbally agreed to pay Rs. 4,000 within four months (or, and, by a bond executed by him on June 14, 1921, agreed to pay the remaining Rs. 4,000 in four monthly instalments of Rs. 1,000 each on July 14, August 14, September 14, and October 14, 1921).

90, Art. 97 was held to apply. Now Art. 97 corresponds to Art. 47 of the new Act.

(bbb) A vendor can sue for recovery of the purchase money remaining unpaid, even if the same is recited in the sale, deed as having been paid (*Meghraj v. Abdulla*, 12 A. L. J. 1304, 25 I. C. 208). The fact of such recital need not be alleged in the plaint, though the plaintiff will certainly have to give convincing explanation of it in his evidence. A suit for recovery of price has been held to be one for specific performance of a contract so that if the sale-deed is unregistered, it can be admitted in evidence in the suit under the proviso to S. 49, Reg. Act (N. A. S. S. *Subramanian v. S. N. A. M. Arunachalam*, 1943 (Mad.) 761). Sec. 55, clause 4 (b) of T. P. Act, creates a charge on the property sold and a suit may be brought either for a simple money decree or for enforcement of the charge. Even if simple money bond is passed for the balance of the price, the charge is not extinguished (*Webb v. Macpherson*, 31 C. 67). The charge cannot be enforced against a *bona fide* transferee without notice (*Guru Dayal v. Haran Singh*, 33 A. 554). If the plaintiff is entitled to interest *e. g.*, if it is agreed to be paid or if the money is payable under a written contract, or if the plaintiff is entitled to it as damages, the interest will also probably be a charge on the property (*See Gangaram v. Nathu Singh*, 5 L. 425 (P. C.)).

3. The defendant has not paid Rs. 4,000 or any part thereof.

The plaintiff claims payment of Rs. 4,000 with interest from the date of suit to that of payment, or, in default, sale of the property specified at the foot of the plaint.

**No. 155—Suit for breach of agreement to
purchase land**

(Form No. 13. Appendix A, C. P. C.)

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

Or, On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty *bighas* of land in the village of for rupees.

If part of the purchase money has been left with the vendee for payment to vendor's creditor, and the amount is not paid, the vendor can recover the amount and can enforce the charge (*Meghraj v. Abdulla*, 25 I. C. 208, 12 A. L. J. 1024; *Subramania v. Subramania*, 39 M. 99; *Reghunath v. Sadagopa*, 12 I. C. 353, 10 M. L. T. 300), even though he had not discharged the debt (*Ram Prasad v. Huchbe*, 7 Mys. L. J. 233; *Sheopati v. Jagdeo*, 1930 A. L. J. 1141; *Mst. Naima Khatoon v. Basant Singh*, 1934 All. 406 F. B.) or suffered in any other way from non-payment (*Pyarelal v. Mt. Kalawati*, 1949 All. 348, 1948 O. W. N. 421). But see *Mahadeo v. Mahipal*, 12 A. L. J. 921, 25 I. C. 939. A Full Bench of the Allahabad High Court has taken the view in *L. Shanti Sarup v. Janak Singh*, (1957 A. L. J. 875) that the vendor has in such cases two other remedies also. He can, before he actually suffers damage, bring an action to have himself put in a position to meet the liability which the purchaser had undertaken to, but had failed to, discharge. For such a suit the limitation would be governed by Arts. 115 and 116 of the Act of 1908, as the case may be. He can also file a suit on the contract of indemnity and recover the loss he has suffered as a consequence of the failure of the vendor to discharge the liability. Such a suit would be governed by Art. 83 of the Act of 1908 and the period of 3 years would run from the date on which the plaintiff is damnified. Under the Limitation Act of 1936, the Article applicable to both the cases would be Art. 55. It has been held in *Makund Lal v. Bholanath*, 131 I. C. 686, 1931 A. L. J. 985, 1931 (All.) 419 that the fact that interest on the debt is mounting up is sufficient to show that plaintiff is damnified. A creditor can also sue for such sum on the ground that the vendee was a trustee for him

2. On the day of 19 , the plaintiff being then the absolute owner of the property (and the same being free from all incumbrances as was made to appear to the defendant), tendered to the defendant a sufficient instrument of transfer of the same (*or*, was ready and willing, and is still ready and willing, and offered to transfer the same to the defendant by a sufficient instrument) on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

USE AND OCCUPATION (ccc)

No. 156—Suit for damages for use and occupation

1. The defendant occupied the hosue described below on January 4, 1925, with the permission of the plaintiff and

(*Sirrirangamma v. Seethmma*, 6 Mys. L. J. 576). But it has been held by a Full Bench in Madras overruling previous rulings that the creditor cannot sue the transferee, except where a trust, express or implied, has been created in his favour, or where there has been a novation of obligation undertaken by the transferee (*Trimulu Subbo v. Arunchalam*, 58 M. L. J. 420, 1930 (Mad.) 382, 124 I. C. 55). The same view has been taken in Lahore (*Maghimal v. Darbara*, 143 I. C. 753, 1933 (Lah.) 695). If the creditor sues the vendor and realizes the money from him, the vendor gets a new cause of action to sue the vendee on the ground of implied indemnity (*See precedent No. 49*). If purchaser sues for possession a decree can be given to him conditional on his paying the money to the vendor (*Pearylal v. Hub Lal*, 1945 (All.) 139).

Limitation for such a suit is three years for simple money decree and 12 years for a suit for enforcement of the charge, from the date fixed for payment. If no such date is fixed, and money is left for payment to a creditor, limitation runs either from the date of sale-deed or within a reasonable period thereafter (*Kallu v. Ram Das*, 26 A. L. J. 53), or the date when the vendee repudiates his liability or the date when by the payment of the debt by the vendor himself the performance of the contract is rendered impossible (*Ram Rachhya v. Raghunath*, 8 Pat. 860). If the suit was for damages it was held in some cases that it was governed by Art. 115 or 116 and limitation ran from the date when the vendor is damaged (*Gulzari Mal v. Maghi Mal*, 141 I. C. 435., 1933 (Lah.) 109; *Narainami v. Vendaniveka*, 56 M. 724, 1933 M. W. N. 370 1933 (Mad.) 424, 144 I. C. 558; *Bhanji v. Govind*, 1933 Nag. 379; *Chand Bibi v. Santosh*, 60 C. 761, 1933 (Cal.) 641, 146 I. C. 863; *Gouri Lal v. Ram Lal*, 1941 Pat. 11; *Mst. Dulhin Sio Sakhi Koer v. Ram Autar Singh*, 1950 (Pat.) 21), and in some cases by Art. 83. (*L. Shanti Sarup v. Janak Singh*, 1957 A. L. J. 875).

(ccc) This form is necessitated when the defendant's possession of the plaintiff's property is not wrongful (in which case, a suit for mesne profits would be maintainable), nor that of a tenant on fixed rent (in

remained in possession upto July 4, 1925, it being verbally agreed that the amount of rent would be settled later on.

(Description of the house).

2. No rent was in fact settled. The use and occupation of the house was reasonably worth Rs. 25 a month.

The plaintiff claims Rs. 150 for use and occupation for six months, with interest from the date of suit to that of payment.

No. 157—Ditto, Statutory Form

(Form No. 9, Appendix A, C. P. C.)

A. B., the above-named plaintiff, executor of the will of X. Y., deceased, states as follows :

1. That the defendant occupied [the house No. Street] by permission of the said X. Y., from the day of 19 , until the day of 19 , and no agreement was made as to payment for the use of the said premises.

which case, a suit for rent would lie), nor that of a licensee without consideration (in which case, no suit would lie). Damages for use and occupation can be claimed when the defendant has been in possession of the property of the plaintiff without any express agreement to pay rent, but with the permission of the plaintiff. In such a case the law presumes an intention to pay a fair and reasonable rent. The Calcutta High Court has held that such a suit can be brought even against a trespasser, for the owner may disregard the trespasser and treat the trespasser as tenant (*Sammiulla v. Nil Mamud*, 97 I. C. 564 Cal.). It is always better to make an alternative claim for mesne profits, as the defendant may deny occupation by permission. If, in a suit for arrears of rent and ejectment, the plaintiff is unable to prove the term of the tenancy, he may amend his plaint and get a decree for damages for use and occupation. This often happens when the terms of tenancy are incorporated in a document which is not admissible in evidence, e. g., in an unregistered *Kirayanamah*, or where not reduced to writing though under the law a lease was necessary (*Raghubar v. Sheo Baksb*, 110 I. C. 875, 1928 (Oudh) 479). See also (*Sheo Karan Singh v. Maharaja Prabhu Narain Singh*, 31 All. 276 F. B.). In this case decree for use and occupation was given in a suit for rent without an amendment. In such cases, an alternative claim for use and occupation may be better and safer. If the defendant's possession was permissive, the plaintiff's title need not be alleged, as the defendant cannot deny it (Sec. 116, Evidence Act). In a pure suit for use and occupations therefore, plaintiff's title need not be alleged but, if an alternative claim for mesne profits is added, the

2. That the use of the said premises for the said period was reasonably worth rupees.
3. That the defendant has not paid the same.
4. The plaintiff, as executor of X. Y., claims (relief claimed).

**No. 158—Alternative suit for damages for use
and occupation or mesne profits**

1. The plaintiff is the owner of the house described below :—

(Description of the house).

2. The defendant occupied the said house on January 4, 1925, with the permission of the plaintiff and remained in possession upto July 4, 1925. No agreement was made for payment of rent.

3. Alternatively, the defendant took possession of the said house and occupied it wrongfully.

4. The letting value of the said house is Rs. 25 per mensem.

The plaintiff claims—

- (1) Rs. 150 with interest from date of suit to that of payment as money due for use and occupation for six months.

- (2) Alternatively, the like sum as mesne profits for the defendant's wrongful possession of the said house.

**No. 159—Alternative suit for rent or for damages
for use and occupation**

1. The plaintiff let the house described below to the defendant on January 4, 1925, by written agreement of that date at a rent of Rs. 20 per mensem. Alternatively, the

plaintiff's title must clearly be alleged. No notice of demand is necessary before suit (*Bhai Jai Kishen v. People's Bank*, 1944 (Lah.) 136).

Limitation : Three years under Art. 55 as there is an implied contract in such cases to pay for use of the land. If the suit is against a co-sharer taking joint land into his exclusive use, Art. 113 (Three years) will apply as there is neither contract nor tort.

use and occupation of the said house was reasonably worth Rs. 20 a month.

(Description of the house).

2. The defendant remained in possession of the said house from January 4, 1925 to July 4, 1925.

The plaintiff claims—

(1) Rs. 120 with interest from date of suit to that of payment, as rent for six months.

(2) Alternatively, the like sum as money due for use and occupation for the said period.

WORK (ddd)

No. 160—Claim for work done under a contract

1. By a contract in writing, dated July 4, 1924, the plaintiff agreed to paint all the doors, windows and railings of the defendant's house at No. 33, Cotton Street, Calcutta, and the defendant agreed to pay for it on completion of the work at the rates given below :—

Rates

2. The plaintiff has completed the aforesaid work on November 14, 1924, and a sum of Rs. 200 is due to him at the aforesaid rates. The defendant has not paid the same or any part thereof.

The plaintiff claims Rs. 200, with interest from date of suit to that of payment.

Defence : The defendant may plead that he has been in possession adversely to the plaintiff, or that the damages claimed are excessive or that there was a contract to pay a lesser amount as rent.

(ddd) Suit for work done lies when work is done by the plaintiff for the defendant under a contract, express or implied. If there was an express agreement which is held to be unenforceable, *e. g.*, under Sec. 28, Legal Practitioners Act, the plaintiff cannot claim a reasonable compensation for work done on the ground of implied contract under Sec. 70, Contract Act (*Kumar Kamakshya v. Kalyan Singh*, 6 Pat. 614, 8 P. L. T. 175, 101 I. C. 549; *Sarat v. Chundra*, 25 C. 805 & *Contra Thangammal v. Krishnan*, 124 I. C. 502, 57 M. L. J. 756, 1930 (Mad.) 132). But when work is done by the plaintiff on his own material in making an article to be delivered to the defendant under a contract of sale (*e. g.*, preparing a pair of boots for the defendant), the work is done by the

No. 161—Suit for failure to do work according to contract

1. The plaintiff was a contractor for the construction of the building of the New Normal School at Muzaffaranga. The defendant is a sub-contractor.

2. By a contract in writing, dated October 14, 1924, the defendant agreed to do all the painting work for the plaintiff in the said building with the best English material, and to fix glass panes on all the doors and windows of the said building, and to finish the said work by March 25, 1925.

3. The plaintiff had to deliver the completed buildings to the Education Department on April 1, 1925, and had given notice of this fact to the defendant. Time was therefore of the essence of the contract of the defendant.

4. The defendant did not do all the painting work of the said building with the best English materials nor did he fix all the glass panes by March 25, 1925.

Particulars

(i) The defendant did not paint the doors of the Superintendent's quarters, the boarding house, kitchen and the latrines.

(ii) The defendant painted all the other doors and railings with home-made paint *beroja* and linseed oil.

(iii) The defendant did not fix any glass panes in the doors of the almirahs of the boarding house.

(iv) The defendant fixed the other panes so negligently that they fell down on account of the blowing of the wind.

plaintiff for himself and not for the defendant, and the suit should be brought for price of goods or for damages for not purchasing goods ordered, and not for work done. A volunteer who does work on the property of another in such a way that the other has no option but to accept the work, is not entitled to any compensation, *e. g.*, a trespasser making repairs in the defendant's house.

A suit for work done can be brought after the whole work has been completed, unless there was a contract for payment for part of the work (Sec. 39, Contract Act *Cutter v. Powell*, 6 T. R. 320).

5. The plaintiff has suffered the following damages :—
Rs.

Employment of extra labour at a specially heavy cost to do the work left undone by the defendant and to remove all the paint applied by the defendant and to have the doors and railings re-painted with new English paint (22 labourers for five days at Rs. 2/8 per man per day) 275

Cost of 100 glass panes for doors of the boarding house almirahs and of 200 panes substituted for the broken panes 150

Cost of English paint 450

Total .. 875

Deduction of the balance which was due to the defendant from the plaintiff under the agreement 350

Total 525

The plaintiff claims Rs. 525, with interest from the date of suit to that of payment.

No. 162—Suit against a builder for defective Workmanship

(Form No. 17, Appendix A, C. P. C)

1. On the day of 19 , at , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

If material is also used by the plaintiff, he can add a claim for its Cost.

In a suit for breach of contract for doing work or for doing the work negligently and not according to the agreement, **the term of the agreement which has been broken by the defendant must be alleged and the breach should be alleged in the words of the agreement, particulars of the breach and damages being added.**

When special damages over and above those which ordinarily arise from the breach are claimed for breach of a contract, **it should be alleged in the plaint that notice was given to the defendant at the time of the contract that such damages would be claimed.**

Limitation : Three years under Art. 18.

[Or state the tenor of the contract]

2. [That the plaintiff duly performed all the conditions of the said agreement on his part.]

3. That the defendant [built the house referred to in the said agreement in a bad and unworkmanlike manner.]

No. 163—Suit for special damages for breach of contract to do work within time

1. The plaintiff hires out motor cars for the journey from Rawalpindi to Srinagar and back. The season for such journey is from May 1 to the end of October.

2. On February 12, 1925, the plaintiff took an Overland motor car to the defendants, who are motor repairers, to have it overhauled and put into perfect running order. The plaintiff, at the time, told the defendants that he required the car to be in perfect running order by April 25, in order to carry passengers from Rawalpindi to Srinagar. He further told the defendants that if the car was not in perfect running order by that date, he would lose a profit of Rs. 100 a week.

3. The defendants verbally agreed to put the car into running order for a sum of Rs. 1,200, and to deliver the same on April 25, 1925.

4. In breach of the said contract, the defendants failed to deliver the said car by April 25, and did not in fact deliver the same until June 6, 1925. The plaintiff has consequently suffered damage. He has lost the use of the car from May 1 to June 5 and has thus suffered a loss of profit of Rs. 500.

The plaintiff claims Rs. 500, as damages with interest from date of suit to that of payment.

Defence : In a suit for price of work done the defendant may plead any defects in the work, or that it was not according to the contract, or that it was not done under defendant's order, or may claim a set off for any damages for delay in completing the work. He may plead that defendant used inferior materials or that the payment was subject to a certificate by an engineer and the same has not been obtained. In a

No. 164—Suit for services at a reasonable rate*(Form No. 7, Appendix A, C. P. C.)*

1. Between the day of 19 , and the day of 19 , at plaintiff executed sundry drawings, designs and diagrams for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth rupees.

3. The defendant has not paid the money.

No. 165—Suit for service and materials at a reasonable cost*(Form No. 8, Appendix A, C. P. C.)*

1. On the day of 19 , at the plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth rupees.

3. The defendant has not paid the money.
(Relief claimed).

No. 166—Suit for work done at a reasonable cost (eee)

1. Between February 1, 1926 and April 25, 1926, at Meerut, the plaintiff sewed a number of clothes and furnished all materials except the upper cloth, at the request of the defendants, but no express agreement was made as to the

claim for bad work, the defendant may plead that the work was done according to the agreement, or that the damages claimed are too remote.

He may plead that he had no notice that any special damage to the plaintiff would result from the breach.

(eee) This form of action becomes necessary when work is done without any express agreement about wages, but with no intention of doing it gratuitously. When, however, there is an express agreement and a suit is based on it, a plaintiff cannot claim reasonable fees for work

rate at which the plaintiff was to be paid for his services and the materials.

2. The cost of the materials furnished by the plaintiff and the plaintiff's sewing charges at reasonable rates come to Rs. 225 as per details given at the foot of the plaint.

3. The defendant has paid Rs. 45, and has not paid the rest of the sum due or any part thereof.

The plaintiff claims Rs. 180, with interest from the date of suit to that of payment.

done in case the agreement is held to be not enforceable for any reason, *e. g.*, under Sec. 28, Legal Practitioners Act (*Kumar Kamakshya v. Kalyan Singh*, 8 P. L. T. 175, 101 I. C. 549, 6 Pat. 614).

II—PLAINTS IN SUITS FOR TORTS* ANIMALS

No. 167—Suit for damages for the bite of defendant's dog (a)

1. The defendant kept at his house in Mohalla Nai Basti, Agra, a dog which, on January 1, 1925, attacked and bit the plaintiff and caused him personal injuries. The plaintiff has, in consequence, suffered damage.

2. The said dog was of a fierce and mischievous nature, and accustomed to attack and bite mankind, and the defendant

*In suits for damages for tort generally speaking, the particular tortious act must be specifically alleged. It is necessary for the plaintiff to bring himself within the four corners of some recognized head of law and there is no right of action for damages at large nor can judges invent new heads of injury. The law of tort is administered in India as a rule of justice, equity and good conscience and though English law need not be applied in all its details when that is found to be unsuitable to local conditions, yet English law is recognized as the basis. (*Baboo v. Must. Subashni*, 1942 (Nag.) 99). Institution of civil proceedings maliciously and without a reasonable or probable cause is not a tort and no action would lie for damages (*Bhupendra v. Trinayani*, 1944 (Cal.) 289). If general damages are claimed no allegation about them is necessary but particulars of any special damages claimed must be given. The tort must have been committed by the defendant himself. A tort committed by defendant's guardian cannot be the basis of a suit against the defendant (*Sohanlal v. Sree Chand*, 1941 Cal. 247, 194 I. C. 119.) But in certain cases suit will lie against a person for tort committed by his deceased predecessor (for such cases see note under "Legal Representatives" below). In certain cases, masters and principals are liable for torts committed by servants and agents respectively, but Government is not liable for acts of its servants done in the exercise of Sovereign powers. (*Kadar v. Secretary of State*, 135 I. C. 74, 1931 (Rangoon) 294; *Mata Prasad v. Secretary of State*, 1931 (Oudh) 29, 128 I. C. 77, 7 O. W. N. 1209). This point has been discussed at length in *Ram Gulam v. The Govt. of India U. P.*, 1950 A. L. J. 464. It is liable if the act is not done in exercise of Sovereign powers, e.g., commercial ventures, (*State of Rajasthan v. Mst. Vidyawati*, 1962 S. C. 933; *Union of India v. Smt. Jasso*, 1962 Punj. p. 572, 315; *Dominion of India v. Anirudh Dotiyal*, 1959 A. L. J. 845).

(a) There are two kinds of dangerous animals; (1) those which are presumed to be dangerous, e. g., lion, bear, monkey, elephant etc., though individuals may be tamed, and (2) those which are presumed to be harmless though individuals may be ferocious and dangerous, e.g. dog, cow, horse, etc. The owner is liable for any mischief done by the

kept the said dog well knowing that it was of such fierce and mischievous nature and so accustomed.

Particulars of the injuries caused

The defendant was bitten in the right leg, there upon he fell down on the pavement and received hurt in his left arm and the head. He was, when lying, again bitten by the dog in his right arm.

Particulars of the special damages claimed

	Rs.
Travelling expenses to and from Kasauli for self and two servants	200
Expenses of treatment and residence at Kasauli at Rs. 10 per day, for 30 days	300
Loss of business as a broker for one month that the plaintiff remained in hospital	300

former class of animals without proof of knowledge of their ferocious nature, and, in a suit for damages for injury caused by such an animal, it is not necessary to plead defendant's knowledge of its ferocity (*Vedapurti v. M. Koppan Nair*, 35 M. 708, 21 M. L. J. 434, 10 I. C. 108.) It is sufficient to allege that the animal belonged to the defendant and that it caused injury to the plaintiff. But if injury is caused by any animal of the latter class, it is necessary to allege in the plaint (and to prove) that the particular animal was ferocious, and was known by the defendant to be ferocious. Negligence of the defendant need not be alleged as that is not necessary to be proved to make the defendant liable (*Ganda Singh v. Chunnilal*, 29 I. C. 862, 19 C. W. N. 916). Facts showing defendant's knowledge of the ferocious character of the animal are mere evidence of that knowledge and should not be alleged in the plaint. Chasing by dogs of sheep or cattle which causes real and present danger of serious harm to the animals chased constitutes an "attack" which entitles the owner to take effective means of protection. The right of protection extends even to the extent of shooting the dogs if shooting is necessary for protection of animals against attack or renewed attack. (*Cronwell v. Sirl*, 1947 All. E. R. 730).

Limitation : Three years under Art. 113.

Defence : The defendant may plead that the animal was not ferocious and was perfectly tame, or, in the case of the second class of animals, that he did not know that it was ferocious or vicious. He may plead that the plaintiff had himself acted in such a manner as to bring the injury upon himself, e. g., that he himself irritated the dog or teased it (*Gorden v. MacKenzie*, (1949) S. C. 109). He cannot plead that he had lost control of the animal, as his liability continues until some other

The plaintiff claims Rs. 300 as general damages for pain and bodily suffering, and Rs. 800 as special damages, total Rs. 1,100 with interest from date of suit to that of payment.

No 168—Suit for damages done to plaintiff's crop by defendant's cattle (b)

1. On November 4, 1925, four bullocks belonging to the defendants strayed on to the plaintiff's field No. 512 in village—and caused damage to the sugar-cane crop growing on the said field and belonging to the plaintiff.

Particulars of damage

The whole crop was destroyed by being partly grazed and partly trampled by the bullocks. Loss of value of crop at Rs. 15 per *bigha* on 20 *bighas*—Rs. 300.

2. The plaintiff claims Rs. 300, with interest from date of suit to that of payment.

person has assumed dominion of the animal (*Krishna Rao v. Maroti*, 1936 (Nag.) 272).

(b) The owner of an animal is liable for damage caused to another's crop by the animal straying upon the latter's field and it is immaterial whether the animal escapes by negligence of the defendant or in spite of his diligent care (*Holgate v. Bleazard*, 1916) W. N. 431; *Madho v. Akaji*, 17 I. C. 899, 8 N. L. R. 190). But he is not liable to an adjoining occupier for their straying where the straying was due to defect in fencing which it was the adjoining occupier's duty to maintain, neither is he liable for straying of his cattle on land adjoining a high way, when being driven on the highway, unless negligence of the owner is proved (*Madho v. Akaji*, supra). Therefore in such a suit all that has to be alleged is the defendant's ownership of the cattle, the straying of the cattle on the plaintiff's land and the damage caused. If field is on a highway, defendant's negligence in allowing the cattle to stray on the field must also be alleged, with particulars. The damage claimed may be not only the actual damage caused, but compensation for loss of future profits may also be claimed. (*Sreebyre Roy v. James Hill*, 9 W. R. 156). In a case of damage done by cattle belonging to several persons where there was no evidence of conspiracy or to show the amount of damages done by the cattle of each separately, the Court awarded nominal damages against each owner (*Har Krishna Lal v. Haji Qurhan Ali*, 1942 (Oudh) 73). The question as to what duty, if any, is cast upon the owner of a land with regard to trespassing animals was considered in *Herbert Richard Fanington v. D. Manisami and others*, 1950 Mad. 58.

The only exceptions to the general law that a person is under no duty towards a trespasser are (1) that he cannot do something which

**No. 169—Like suit, when plaintiff's field
is on a highway**

1. The plaintiff is the Bhumidhar of a field No. 512 in village—and had grown wheat and gram crops in the *Rabi* of 1365 *Fasli*.

2. The said field is on a highway which goes from Jansath to Miranpur.

3. On February 14, 1958, four bullocks belonging to the defendant, who were being driven along the said highway, strayed, through the negligence of the defendant's servant who was in charge of them, on to the plaintiff's said fields and caused damage to the plaintiff's crops.

Particulars of negligence

The defendant left the said bullocks in charge of his servant Chhiddu, a lad of 8 or 9. When the bullocks were passing in front of the plaintiff's field, the said Chhiddu left them and went to a neighbouring grove of *berries* where several other boys of the village were plucking *berries* and began to play with those boys and to pluck *berries*, without caring to attend to the bullocks, who therefore strayed on to the plaintiff's field.

Particulars of damage

The plaintiff's crops were partly grazed and partly trampled by the bullocks and the plaintiff lost the value of the whole crop of 20 *bighas* which was worth Rs. 300, at Rs. 15 per *bigha*.

The plaintiff claims Rs. 300, with interest from date of suit to that of payment.

ARREST—WRONGFUL—*See False Imprisonment.*

is dangerous to a trespasser if he knows or has reason to believe that the trespasser is already or may be, on his property and (2) that he cannot do anything to lure on his land and kill animals who would keep outside his land but for allurements.

Limitation : Three years from the date of trespass (Art. 87).

Defence : The defendant may plead that the plaintiff was bound to fence his field, or that the cattle strayed from the highway without any negligence of the defendant.

ASSAULT AND BATTERY (c)

No. 17c—Suit for assault and battery

1. On November 5, 1924, the defendant assaulted and beat the plaintiff at the plaintiff's house, by first spitting on his face and then by striking him with a lathi and thus fracturing the *ulna* of his left arm.

2. In consequence, the plaintiff was for a long time unable to transact his business as a pleader and incurred expenses of surgical and medical treatment.

Particulars of special damage

(1) Expenses of medical treatment :

	Rs.
Fee paid to Dr. Smith for setting the fractured bone ..	150
Fee paid to Dr. Amba Prasad for assisting Dr. Smith ..	20
Fee paid to Dr. Smith for eight visits at Rs. 16 ..	128
Fee paid to Dr. Amba Prasad for 48 visits at Rs. 5 ..	240
Paid to Ramlal compounder for attendance ..	20
Paid to Banerji and Sons, Chemists, for price of medicines, bandages etc.	72
Total ..	630

(2) Loss of legal practice for one month and a half at Rs. 500 per mensem 750

(c) Assault is an attempt at battery with a menacing attitude. Battery is the actual beating, or using criminal force, such as spitting on the face, throwing water over a person, throwing over a chair in which one is sitting etc. For distinction between mere insult or intimidation and assault See A. I. R. 1964 A. P. 382. **The plaintiff must describe the assault or battery, and must also allege the injury caused.** The occasion on which the assault was made and the minute details about the altercation which resulted in the assault should not be alleged in the plaint. The fact that the defendant was prosecuted and convicted or acquitted of the assault is no bar to a civil suit. It should not, however, be alleged in the plaint, much less proved, as the civil suit is decided on independent evidence. But damages awarded by the criminal court should be taken into account in assessing the damages which the plaintiff claims. Plaintiff may claim general and special damages, the former for non pecuniary losses and the latter for losses computable in money. The nature of these damages is well discussed in *Bharon Din v. Phul Chand* (A. I. R. 1967 M. P. 48). For mode of assessment of damages in cases of personal injury see *Km. Deepa Tewari v. Banwari Lal* A. I. R.

The plaintiff claims—

- (1) Rs. 1,000 general damages for humiliation, pain and bodily suffering.
- (2) Rs. 1,380 as special damages.
- (3) Interest from date of suit to that of payment.

ATTACHMENT

No. 171—Suit for damages for wrongful attachment (d)

On December 15, 1924, the defendant caused the following cattle and crop of the plaintiff to be wrongfully attached in execution of his decree No. 107 of 1924, of the munsif's court, Basti, against one Ramlal :—

Two bullocks, four she-buffaloes, two cows, one mare and the sugar-cane crop in plots Nos. 632 and 633 in villages.....

2. The cattle and the crop remained under attachment from December 15, 1924 to February 14, 1925, and the plaintiff has suffered damage.

1968 M. P. 239; *Swaraj Jotors v. T. R. Raman* A. I. R. 1968 Ker. 315 and *Roshan Lal Balle v. Sudesh Kumar* A. I. R. 1968 J. & K. 2.

If the battery causes death, the legal representatives of the deceased can bring a suit for damages under the Fatal Accidents Act (see foot note (u) below. Such a suit would be possible only when the person causing death is not sentenced to death.

Limitation : Three years under Art. 113.

Defence : The defendant may plead provocation, self defence, accident or consent, as a defence. It is necessary to give particulars of these pleas. But infancy or lunacy is no defence to such a suit.

(d) It is an act of tort to attach property of one person in execution of a decree against another, and the owner is entitled to recover damages.

He should allege the attachment and facts showing that it was wrongful, in addition to those showing his right to sue. His right to sue may be based on his title to the property or his possession or control over it at the time of attachment (*Jawahir Mal v. Punjab N. Bank*, 1936 (Lah.) 524).

It is not necessary to plead that the attachment was made maliciously (*Ramaswami v. Muthuswami*, 13 I. C. 799, (1912) M. W. N. 423; *Kishori Mohan v. Harsukh*, 17 C. 436; *Firm Mangal Chand v. Musammal Zainab*, 90 I. C. 266, 1926 (All.) 177; *Kainthessain v. L. Pirbhu Lal*, 1938

Particulars of damage

	Rs.
Loss of milk of the cows and the she-buffaloes at 30 seers a day, worth Rs. 6, <i>minus</i> cost of feeding them at Rs. 3 per day, for 62 days	186
Hire paid by the plaintiff for two bullocks hired for his cultivation purposes	40
Depreciation in value of the cattle	200
Value of the crop misappropriated by Raju, intermediate custodian	300
The plaintiff claims Rs. 726 with interest from date of suit to that of payment.	

All. 508; *N. Soboo v. Babulal*, 1925 (Nag.) 390; *Chunnilal v. Deo Ram*, 1948 Nag. 118). A decree-holder would, therefore, be liable for his mistake even if he acted in perfect good faith in attaching the property of a stranger. (*K. S. R. M. Chattyar v. Lakshmi*, 1940 (Rang.) 43, 186 I. C. 879). The law in India is different in this respect from that in England. The Punjab ruling to the contrary in *Hukumchand v. Umardin*, 54 I. C. 827, takes no notice of this fact. The plaintiff can claim recovery of the property and all the damage which he has sustained by reason of the attachment, whether by loss resulting from default or dishonesty of the custodian of the property, or by the property deteriorating, or by the plaintiff being temporarily deprived of its use, though for recovery of property the procedure of O. 21, R. 58 would be better. It is not necessary to show that the defendant has taken away the property. So long as it is not available to be delivered back, to the plaintiff, the defendant is liable (*Bishambhar v. Gaddar*, 33 A. 306, 8 A. L. J. 92, 9 I. C. 317). Even if no special and actual damage has resulted, or the plaintiff fails to prove the actual damage alleged by him, he can be awarded general damages, which may be nominal, but his suit cannot be entirely dismissed (*Mudhun Mohan v. Gokul Dass*, 10 M. I. A. 563). But the Lahore High Court refused to award even nominal damages, in a case when the attachment was made *bona fide* and on sufficient grounds and was withdrawn at a very early stage on the defendant's own application and remarked that at best it was a case of slander of title for which proof of special damage was necessary (*Sain Das v. Ujagar Singh*, 186 I. C. 646, 1940 (Lah.) 2). The view is consistent with that taken in *Hukum Chand v. Umar Din*, but against the views of the other High Courts.

If, however, the attachment was not wrongful, no action would lie even if it was made maliciously. A distraint was made for arrears of rent under warrant issued under S. 53 of the Presidency Small Cause Court and was withdrawn on the plaintiff paying the arrears due, and no attempt was made to have the warrant discharged by the court (*Haji Nasiruddin v. Patel Haji*, 1941 (Bom.) 286).

No. 172—Suit for damages for attachment before judgment (e)

1. The defendant instituted a suit (being suit No. 500 of 1924) in the court of the Munsif of Agra against the plaintiff, for recovery of Rs. 500 due on a bond.

2. In connection with that suit, the defendant, on August 4, 1924, applied for, and obtained, an order of attachment before judgment of the plaintiff's stock-in-trade,

Limitation for such suits in case of movable property is only one year from the date of Seizure (Art. 80). Date of sale is immaterial, and so are the proceedings under O. 21, R. 58, C. P. C. or suit under O. 21, R. 63. But standing crop is not included in movable property and a suit for its wrongful attachment can be brought within three years under Art. 113 (*Katagiri v. Patabandi*, 21 I. C. 213). It is not a continuing wrong to which Sec. 22 could be applied but the seizure being illegal *ab inito* cause of action arises only once, on the date of seizure (*Pannaji Senaji*, 1930 M. W. N. 305; *Eng Gin Moh v. Chinsee Merited Banking Co.*, 1940 (Rang.) 276).

Defence : The defendant may deny plaintiff's ownership of the property, but if the property has been released on plaintiff's objection under O. 21, R. 58, C. P. C. the defendant cannot have the question of plaintiff's ownership re-agitated (*Jawahar Mal v. Punjab N. Bank*, 1936 (Lah.) 524; *K. S. R. M. Chettyar v. P. S. Lakshmi*, 1940 (Rang.) 43. He must, in such a case, file regular suit under O. 21, R. 63, C. P. C. for having the order set aside, and must have the suit for damages postponed till the decision of the regular suit or may have both the cases heard together. He may prove, though it is not necessary to plead, that the special damages claimed have not been suffered. It is no defence to plead innocence or a *bona fide* mistake of the defendant (*Bhutnath v. Chandra Binode*, 16 I. C. 443, 16 C. L. J. 34), though that fact may mitigate the amount of damages, but that is only when the defendant does not try to justify the act (*Bishambhar v. Gaddar*, 33 A 306). The Lahore High Court has held that if the attachment was *bona fide* and on sufficient grounds and was withdrawn on creditor's own request even nominal damages cannot be awarded (*Saindas v. Ujagar Singh*, 1940 (Lah.) 21, 186 I. C. 646).

He may plead that loss was caused purely by *vis major*, e. g., by death, storm, rain, etc., if it can in no way be attributed to any negligence of the defendant or of any one acting on behalf of the defendant, for instance, if the attached cattle die or are washed away by flood, the defendant would not be liable for their price, provided he had taken all necessary precautions.

(e) Mere attachment does not give any cause of action, unless it was obtained maliciously and without a reasonable or probable cause (*Nanjappa v. Ganpathi*, 35 M. 598, 21 M. L. J. 1052, 12 I. C. 507). **Malice and want of reasonable and probable cause must, therefore,**

and the plaintiff's stock-in-trade was attached on August 7, 1924 in pursuance of the said order.

3. The defendant obtained the said order maliciously, without any reasonable or probable cause, and on a false allegation that the plaintiff was intending to dispose of his stock-in-trade.

4. The plaintiff suffered damage.

Particulars

Loss of business by reason of the plaintiff's shop remaining closed for two months Rs. 1,200

The plaintiff claims—

- (1) Rs. 500 as damages for loss of reputation and credit.
- (2) Rs. 1,200 as special damages.
- (3) Interest from date of suit to that of payment.

be alleged, in addition to the fact of such attachment. Section 95, C. P. C. provides an easier remedy for such cases. The defendant whose property is attached may move the court, by an application to award him compensation for such attachment and can obtain an order simply by proving that the attachment was applied for on insufficient grounds, or, if the suit in connection with which the attachment order was passed is dismissed, that there was no reasonable or probable cause for instituting it. The advantage of this summary procedure is the saving of court fees, and according to Madras High Court, the absence of necessity to prove malice though in Oudh it has been held that malice need not be proved in a suit also (*Manohar Lal v. Gobardhan*, 9 I. C. 60, 13 O. C. 35), and Calcutta High Court has held that even absence of reasonable and probable cause need not be proved (*Bhutnath v. Chandra*, 16 I. C. 443, 16 C. L. J. 34). It is submitted that the Oudh view is more logical than the Madras view, for there seems to be no reason why a distinction should be made between the case of an application, and that of a suit. But by an application, the defendant cannot obtain more compensation than the pecuniary jurisdiction of the court, and the determination of an application under Section 95 will bar a regular suit.

Limitation : There used to be conflict of rulings about limitation for such suits. 'Two years' rule of Art. 36 was applied in *Surajmal v. Manak Chand*, 6 Bom. L. R. 740, while Art. 49 was applied in *Manavikraman v. Avisilan*, 19 M. 80. But it is certain that Art. 29 (one year rule) has no application (*Arjan v. Abdul*, 64 I. C. 513). Under the act of 1963, the articles applicable will be 79 or 80.

Defence : The defendant in such a suit may plead that he had sufficient grounds for making the application or that he was not actuated by malice. But the fact that the object of the defendant was to enforce speedy payment by putting pressure on the debtor and not to prevent

CONSPIRACY (f)**No. 173—Suit for conspiracy to defraud
decree-holder**

1. Defendant No. 2 is the brother of the wife of defendant No. 1; defendant No. 3 is the son of the mother's sister of defendant No. 1; and defendant No. 4 is the son of the sister of defendant No. 1.

2. The plaintiff obtained a decree against defendant No. 1 for recovery of Rs. 500, (being decree No. 125 of 1915), from the court of the Munsif at Agra.

3. On September 4, 1924, the plaintiff applied for attachment of eight bullocks, the residential house, and grain belonging to defendant No. 1. On November 5, 1924, a warrant of attachment was issued by the court, for the sum of Rs. 545, which was the amount of the plaintiff's decretal debt and costs.

4. Before the issue of the said warrant, the defendant unlawfully and fraudulently conspired and agreed together to defraud the plaintiff and to prevent him from recovering the money due to him under the said decree by means of the said execution.

5. In pursuance of the said conspiracy, the defendants did the following acts :—

(i) Defendant No. 1 transferred five of his bullocks to defendants Nos. 2 and 3, and the said defendants Nos. 2 and 3 took away the said bullocks to their respective villages.

any intended transfer is no defence, as this itself amounts to malice (*Nanjappa v. Ganapathi*, 35 M. 598, 21 K. I. J. 1052, 12 I. C. 507).

He may plead that the plaintiff had made an application under Section 95 which was dismissed. It is no defence that the order of attachment was set aside on notice.

(f) The mere fact of two or more persons conspired to do an unlawful or fraudulent act will give no cause of action against them, unless an overt act is committed in pursuance of the conspiracy and special damage is caused to the plaintiff (*Wacher London Society*, (1912), (A. C. 107), 122). **The conspiracy, the overt acts committed in pursuance of it, and special damage should be alleged in the plaint.**

(ii) Defendant No. 1, sold to defendant No. 4 the said house sought to be attached.

(iii) Defendant No. 2 took away all the grain from the house of defendant No. 1 to his own village and disposed of there.

6. For the above reasons, the *Amin* who went to execute the warrant was unable to attach the cattle or the grain, and, though the house had been attached, yet it has been released on the objection of defendant No. 4 and the plaintiff has thus been unable to recover the amount of his decree.

The plaintiff claims Rs. 545 as damages, with interest from the date of suit to that of payment.

CONVERSION OF GOODS (g)

(See also *Trespass and Detention*)

No. 174—Suit for conversion of goods entrusted to the defendant

1. The plaintiff is the official receiver of the estate of Ram Gopal of Hapur, District Meerut, who was adjudged insolvent on May 3, 1921.

2. Prior to May 3, 1921 the said Ram Gopal delivered two black horses to the defeneant that he might break them.

In a case of conspiracy all the conspirators will be jointly and severally liable for the whole damage suffered by the plaintiff, irrespective of the fact that the tort was actually committed by only some of them (*Baboran v. Chandandhar*, 99 I. C. 399 Nag.).

Defence : The object of the conspiracy may be shown to have been perfectly legitimate, *e. g.*, to safeguard the defendant's own interest. The overt acts may be justified and shown to have been done in the defendant's own right without any fraudulent intention. It may be shown that the plaintiff has not suffered any damage or that the damage claimed is imaginary or too remote.

(g) Conversion is wrongful taking or using or destroying of the goods or an exercise of dominion over them inconsistent with the title of the lawful owner. It differs from trespass in that the latter is essentially a wrong to the *actual possession* and cannot, therefore, be committed by a person himself in possession, while conversion is a wrong *against the person entitled to immediate possession*. Conversion is a wider term than trespass. A mere wrongful taking of the goods is trespass

3. The defendant did not re-deliver the said horses to the said Ram Gopal or the plaintiff. Since his appointment as receiver, the plaintiff demanded them by registered notice in writing, dated June 20, 1921 but the defendant refused to deliver them, and has sold them and converted the proceeds of sale to his own use.

4. The defendant thereby wrongfully deprived the plaintiff of the said horses, the value of which was Rs. 1,500.

The plaintiff claims Rs. 1, 500 damages for such conversion with interest from date of suit to that of payment.

No. 175—Suit for conversion by sending cattle to the pound

1. On November 20, 1925, the defendant wrongfully seized 4 bullocks belonging to the plaintiff and grazing in the plaintiff's field, and sent them to the pound, where they were detained for 4 days and released on the plaintiff paying Rs. 18 as fees and feeding charges.

but if the defendant further intends some use to be made of them by himself or by those for whom he acts, or, owing to this act, the goods are destroyed or consumed to the prejudice of the lawful owner, the tort becomes a "conversion." Such an action for conversion resembles one for detention. For difference between trespass, conversion and detinue see *State of Rajasthan v. Gangadar* A. I. R. 1967 Raj. 199.

Any appropriation by the defendant of goods taken possession of by him whether by trespass or in a rightful manner, is conversion. The plaintiff's remedy is by a claim for damages. **He must allege his right to immediate possession, and the defendant's appropriation of the goods.** He must show a right to immediate possession of the goods and not merely a property in reversion. So an owner of goods lent to another for a term cannot sue, nor can the owner of goods in possession of another who has lien on them; but any temporary or special ownership with immediate possession, as under a lien, pledge or bailment is sufficient to give a right to sue. **If the property was rightfully in possession of the defendant a demand by the plaintiff or by his authority and a refusal by the defendant should be alleged to prove conversion by the defendant,** (*Vishva Nath v. Bombay Municipality*, 1938 (Bom.) 410, 177 I. C. 636), if no overt act evidencing the conversion is known or can be proved. The amount of damages will be the value of the property on the date of conversion (*Shiva Prasad v. Prayag*, 61 C. 711). In a case when defendant plucked tea leaves from plaintiff's garden and manufactured tea and sold it, the Calcutta High Court passed a decree for the sale price of manufactured

2. The plaintiff was deprived of the use of the said bullocks for 4 days and has suffered damages.

Particulars : Hire paid for 4 bullocks hired by plaintiff for ploughing his fields at Re. 1 per bullock per day for 4 days : Rs. 16.

The plaintiff claims Rs. 34 as damages, with interest from date of suit to that of payment.

COPYRIGHT (h)

No. 176—Suit for infringement of copyright in a book

1. The plaintiff is the author of a book entitled "The Law of Partnership," and the owner of the copyright therein.

2. The defendant has infringed the plaintiff's copyright in the said work by publishing in January, 1924, a literal translation of the said book in the Urdu language, and by putting it on the market for sale, without the plaintiff's consent.

(Or, the defendant has infringed the plaintiff's copyright in the said book by copying out *verbatim*, without the plaintiff's consent, the following portions of the plaintiff's book in

tea as damages and did not allow a deduction for cost of the manufacture (*Carrit Morgan v. Manmath Nath*, 1941 (Cal.) 691). In cases of bonds the value will be that of actionable claims which can be based on them but if they are void damages will be nominal (*ibid.*). Additional special damages may be claimed if reasonable and not remote (*Sitaram v. Ishwari*, 1934 Pat. 57).

Limitation : Limitation under the Act of 1908 was three years under Art. 48 whether the conversion is honest or dishonest (*Lewis Pugh v. Ashutosh*, 56 I. A. 93, 5 Pat. 516, 27 A. L. J. 170, 114 I. C. 604, 49 C. L. J. 415, 31 Bom L. R. 702, 1929, (P. C.) 69), and whether it is due to inadvertence or want of reasonable care (*Adjai Coal Co. v. Pannalal*, 34 C. W. N. 483, 32 Bom. L. R. 654, 58 M. L. J. 536, 1930 (P. C.) 113). Under the Act of 1963, it will be two years under Art. 68 from the date of knowledge of conversion.

(b) The law of Copyright was formerly governed by Act III of 1914, which made a major portion of the English Copyright Act 1911, applicable to India. The subject is now governed by a Consolidating Act being Act No. XIV of 1957, the Copyright Act, 1957, which repeals the earlier Act of 1914, Sec. 14 of the Act of 1957 gives the meaning of

his book entitled "Partnership in India" which he has published in January 1924 :—

- 1.
 - 2.
 - 3.
- etc.)

3. Since the publication of the defendant's said book, the sale of the plaintiff's said book has considerably fallen. The plaintiff estimates this loss at Rs. 2,000.

4. The defendant has, in his possession a large number of copies of the said book complained of as an infringement. The plaintiff demanded the same from the defendant by a notice sent by post on September 14, 1924, but the defendant refused to deliver them.

word "Copyright" and S. 17 provides who will be the first owner of a copyright. The terms of copyright in various kinds of work are mentioned in Ch. V, consisting of secs. 22-29. Registration of copyrights is provided for in Ch. X and infringement thereof in Ch. XI. Civil remedies for infringement are mentioned in Ch. XII and offences relating to the infringement of copyright are dealt with in Ch. XIII.

The owner of a copyright may sue for its infringement. He may be the original owner or his assignee or exclusive licensee. It also includes the publisher in case of anonymous or pseudonymous works until the identity of the author or authors is established (S. 54). Assignment of copyright can be made only in writing signed by the owner or by his duly authorized agent (S. 19) but an assignment of a copyright in a future work takes effect only when the work comes into existence (proviso to S. 18 (1).) But in a case in which the author who used to prepare annual almanacs had agreed to give them to the plaintiff for publication for a period of 5 years, the Madras High Court held that it was a case of equitable assignment and therefore the plaintiff could maintain a suit against a third person to whom the author gave the almanac for publication (*P. R. Viswanath v. Mithukumara-Swami*, 1948 (Mad.) 139, I. L. Q. 1947 Mad. 768, 1937 M. W. N. 561, 1947-1 M. L. J. 382). A mere selling agent cannot bring a suit (*Petty v. Taylor*, (1897) 1 Ch. 465); nor can a person who is not an exclusive licensee bring a suit in his own name. The exclusive licensee should join with him as the owner either as plaintiff or as defendant. The plaintiff can claim injunction and damages or an account of profits or such other remedies as are or may be conferred by law for the infringement of a copyright (S. 55). Injunction can be claimed by showing either that damages have resulted to the plaintiff or there is a probability of damages (*Borwick v. Evening Post*, (1888) 37 Ch. D. 449), and that the defendant is likely to continue his infringement and that this is not simply trivial (*Cox v. Land and Water*,

5. The defendant threatens and intends to repeat the infringement of the said copyright of the plaintiff.

The plaintiff claims—

(1) Rs. 2,000 damages.

(Or, that an account be taken from the defendant of the profits he has made by sale of his said book, and a decree for the amount of those profits be passed).

(1869) I. R. 9 Ex. 324). As damages, the plaintiff can claim the loss suffered by him by diminution of sale of his work or the loss of profits which he might otherwise have made (*Biren v. Keen*, (1918) 2 Ch. 281). (For the basis of assessment of damages see 1961 Mad. 114). The plaintiff may pray for an account of profits made by the defendant by sale of his work and may claim the amount of such profits. As this is also in the nature of damages, the plaintiff cannot claim both this relief as well as damages (*De Vitre v. Betts*, (1873) L. R. 6 H. L. 319). The plaintiff is owner of all infringing copies under section 58 and may claim recovery of all infringing copies or damages in respect of conversion thereof. Damages for conversion are not limited to the profits but extend to the full value of copies converted (*Biren v. Keen supra*). Damages for conversion on the basis of full price should be specifically claimed and the relief for damages for infringement of copyright will not cover damages for detention of infringing copies (*Biren v. Keen supra*).

The suit should be brought in District Court having jurisdiction (S. 62). The Dist. Court which will have jurisdiction is the court in whose local limits the plaintiff or where there are more than one, any of them resides.

In the plaint the facts entitling the plaintiff to sue including the capacity, e.g. owner, assignee, licensee etc. in which he sues and facts showing how the right has been infringed by the defendant should be set up in detail. Infringement may be proved by providing similarities, omissions, mistakes, plan, phraseology etc. If direct evidence is not forthcoming but as similarities can be explained by coincidence or common source, evidence must be cogent (*Decks v. H. G. Wells*, 142 I. C. 815, 1933 A. L. J. 393, 1933 (P. C.) 26).

The author is the first owner of the copyright (S. 17). The person whose name appears on the work as the author or the publisher shall, in proceedings relating to infringement be presumed to be the author or publisher as the case may be. (S. 55 (2)). If the defendant wishes to deny that fact he will have to do so specifically alleging the grounds on which he bases his denial. For other presumptions in plaintiff's favour in such a suit see Sec. 6. "Title" of the work does not involve a literary composition and is not sufficiently substantial to justify protection and is not therefore by itself a proper subject-matter of copyright, but in particular cases a title may be on so extensive a scale and of so important a character as to be a proper subject of protection (*Francis Day v. T. O. F. Corporation*, 1940 (P. C.) 55, 187 I. C. 449). If a plaintiff claims copyright in "title" he should allege such special facts as would support that claim.

2. An order to the defendant to deliver to plaintiff all the copies of the said book of the defendant that may be in his possession.

(3) An injunction to restrain the defendant, his agents and servants, from continuing or repeating any such infringement of the plaintiff's copyright, and from doing any act to infringe or injure the said copyright.

DETENTION OF GOODS (i)

No. 177—Suit for movables inherited by the plaintiff

1. One Rahim Baksh was, at the time of his death, owner of the movable property entered in the schedule appended to the plaint.

2. The said Rahim Baksh died on November 4, 1920. He left no widow, sister, parents or grand-parents, or any issue except the plaintiff. The plaintiff is his only son. The defendant was the kept mistress of the said Rahim Baksh.

3. At the time of the death of the said Rahim Baksh, the defendant took into her possession the said property and

Limitation : Three years under Art. 88 from the date of the infringement. This is a continuing wrong and Sec. 22 will apply.

Defence : The defendant may show that the copyright does not subsist in the work, *e. g.* 50 years have expired since the work was first published, or that the plaintiff is not the owner of the copyright or that his act does not amount to an infringement. And falls under one of the clauses of Sec. 52 of the Act of 1957. He may plead that the work is of a libellous, immoral, obscene or irreligious nature, in which no copyright should be enforced (*Glyn v. W. F. Film Co.*, (1916) 1 Ch. 261). If the defendant denies the plaintiff's ownership, it is not necessary for him to plead who is the owner. There is at present no law for compulsory registration of books. Copyright also can be registered under Ch. X of Act of 1957, and the entries in the register of copyrights maintained under the Act is *prima facie* evidence of the particulars entered therein. Want of knowledge of infringement of the right of the plaintiff is no defence but defendant may prove that there was no reasonable ground for suspecting that he was infringing the plaintiff's right (*Performing Right Society v. Urban Council of Bray*, 1930 A. C. 377, 32 P. L. C. 20 (English)).

(i) Detention is the adverse or wrongful holding of the goods of another. The injurious act being the wrongful detention, and not the original taking or obtaining of the possession, it is immaterial whether

has retained it since and deprived the plaintiff of its use, and has refused to deliver it to the plaintiff, although, the plaintiff demanded it by a notice sent by registered post on January 20, 1921.

4. The plaintiff has thereby suffered damage.

Particulars

	Rs.
Value of the property as given in the said schedule	10,00
Loss of profit which the plaintiff would have made by the sale of milk of 12 cows and 2 she-buffaloes for 2 months at Rs. 5 per day	300

The plaintiff claims—

- (1) Return of the said property by the defendant.
- (2) Rs. 300 as damages.

In the alternative, Rs. 1,300 as damages.

No. 178—Suit for movables wrongfully detained

(Form No. 32, Appendix A, C. P. C.)

1. On the day of 19 , plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods,] the estimated value of which is rupees.

2. From that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

The plaintiff claims—

(1) Delivery of the said goods, or rupees, in case delivery cannot be had.

(2) rupees compensation for the detention thereof.

they were obtained by the defendant by lawful means, as by bailment or finding, or by a wrongful act, as by a trespass or conversion. The usual evidence of detention is the refusal to deliver or return the goods when demanded. **The plaintiff must have the right to the imme-**

*The Schedule***No. 179—Suit for detention of goods hired by the defendant**

1. On December 29, 1921, the defendant hired from the plaintiff a *Kolhu* or iron sugar-cane pressing machine on the verbal agreement that the defendant should have the use of the said *Kolhu* upto January 31, 1921 and should return the same to the plaintiff not later than February 2, 1921.

2. The defendant has not returned the said *Kolhu* to the plaintiff but still detains the same.

3. In consequence of such detention the plaintiff has been prevented from letting the said *Kolhu* to other customers and has lost the profits which he would have earned thereby.

The plaintiff claims—

- (1) Return of the said *Kolhu* or Rs. 150, its value.
- (2) Rs. 20 damages for its detention.

No. 180—Suit for goods lent to defendant

1. On January 20, 1920, the plaintiff lent 2 *daris* of the value of Rs. 150 and a carpet of the value of Rs. 100 to the defendant for a period of 15 days.

2. The defendant detained the said goods and has not returned them to the plaintiff, though the plaintiff demanded them from him on February 10, 1920.

The plaintiff claims return of the said *daris* and carpet or Rs. 250, their value.

No. 181—Suit for restoration of movable Property and injunction

(Form No. 39, Appendix A, C. P. C)

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grand-father which was

diate possession of the goods at the time of suit arising out of an absolute or a special property, an interest in reversion not being sufficient. Such right should, therefore, be alleged in the plaint, in addition to the fact of defendant's detention. The plaintiff may sue for recovery of the specific goods if the case falls under Sec. 8,

executed by an eminent painter] and of which no duplicate exists [*or state any facts showing that the property is of a kind that cannot be replaced by money*].

2. On the day of 19 , he deposited the same for safe keeping with the defendant.

3. On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

The plaintiff claims—

(1) That the defendant be restrained by injunction from disposing of, injuring, or concealing the said painting.

(2) That he be compelled to deliver the same to the plaintiff.

EASEMENTS, WRONGS TO (j)

No. 182—Suit for obstruction to plaintiff's right of way (k)

1. The plaintiff's grove No. 514 is situated to the east of the defendant's grove No. 513, in village and a public road runs to the west of the defendant's grove.

Specific Relief Act; in all other cases he must sue for damages. In any case he can add a claim for damages for the detention. Even when he sues for recovery of the goods, he must in the alternative claim their value. For the measure of damages *see* note to "Trespass to goods". In case the goods are of special value and the defendant threatens to destroy them, an injunction may also be claimed.

Limitation : Three years under Art. 91.

Defence : The defendant may deny the plaintiff's title to the goods or his right to immediate possession of the goods, or the fact of detention. He may plead that he has a lien on the goods. Particulars of the "lien" should be given.

(i) An easement can be acquired by three methods (1) by express or implied grant; (2) by user as of right for the statutory period of 20 years under the Easement Act; and (3) by immemorial user based upon

2. The plaintiff was, and is, entitled to a right of way from his grove No. 514 over the defendant's grove No. 513 to the said public road, and back from the public road over the said grove No. 513 to grove No. 514, for himself, his servants, cattle and carts at all times of the year.

3. The plaintiff was, and is, entitled to the said right of way by enjoyment thereof for over 20 years before the obstruction of the defendant hereinafter alleged, as of right and without interruption (or by grant thereof from Ramlal, deceased father of the defendant, the then owner of grove No. 513, by a deed, dated June 3, 1899).

the fiction of a lost grant. (*Velji Kachrabhai v. Bhupatrai*, A. I. R. 1951 Saurashtra 60). It can also be claimed on the basis of a custom.

Acquisition of an easement by long and immemorial user which leads to an inference of grant has been recognised. In the cases which have recognised this right, enjoyment for a considerable long time has been held to culminate in a right of easement on the supposition that at some distant period of time the right must have been conferred by a grant. Plea of immemorial user should ordinarily be specially raised, but if all the facts are stated in the pleadings relief could be given on the basis of a lost grant when the other side has not been taken by surprise. (*Velji Kachrabhai v. Bhupatrai*, A. I. R. 1951 Saurashtra 60).

The combined effect of Secs. 15, 28 and 33 to 35 of Easements Act is that for all practical purposes the principles of an actionable disturbance of an easement are the same in India as in England. Interference with the right of easement may be graded into two degrees; (1) An interference which does not result in substantial damage within the definition of explanation 1 to Sec. 33 and gives no cause of action altogether. (2) An interference which so materially affects the utility of the dominant tenant that injunction would be the appropriate remedy. Whether specific relief by way of injunction should be granted will depend on the provisions of the Specific Relief Act and each case will have to be determined upon its peculiar facts and circumstances. (*Ebrahim Ji v. Badruddin*, A. I. R. 1951 Saurashtra 46).

A person whose right of easement is disturbed has, in addition to his right of abatement of the disturbance a remedy in an action for damages, or injunction, mandatory or prohibitory or both, according to the circumstance of the case. A claim for damages or compensation is admissible in all cases of disturbance **provided that the disturbance has actually caused substantial damage** to the plaintiff (Sec. 33, Easements Act). If the disturbance is so trivial that no substantial damage is caused to the plaintiff, he has no right of suit (*Gajadhar v. Kishorilal*, 13 A. L. J. 385). The meaning of "substantial damage" has been explained in the three explanations appended to Sec. 33. If the disturbance affects the evidence of the easement or diminishes the value of the dominant heritage,

[Or, if a right of way by necessity is pleaded, paras. 1, 2 and 3 should be as follows :—

1. The parties were joint owners of the groves Nos. 513 and 514 up till 1910, and the way for men, cattle and carts from the highway to the grove No. 514 and back from the grove No. 514 to the highway lay over the grove No. 513 at all times of the year.

it causes "substantial damage". The requirement of substantial damage should not be confused with "special damage" and it is not necessary that special damages should be caused to the plaintiff, though if the same have been caused they can be recovered. If "substantial damage" is caused by the disturbance and no special damages have resulted, then the plaintiff can claim general damages which may be nominal or exemplary according to the circumstances of the case (*See Mayne on Damages*, 10th edition, p. 437).

A claim for injunction can be made in all cases in which a suit for compensation lies and also to prevent a threatened disturbance "when the act threatened or intended must necessarily, if performed, disturb the easement" (Sec. 35). If, however, money compensation is an adequate relief, injunction cannot be granted.

In an action for invasion of the right of easement, therefore, the plaintiff must allege the existence of the right, with necessary particulars and facts showing its obstruction or disturbance. If the claim is for injunction, "the substantial damage" arising from the disturbance or the apprehension of disturbance from the intended act of the defendant, and in case of a claim for damages the damage resulting from the disturbance would also be clearly alleged. As to the mode of pleading easement see Ch. VI. In case of obstruction of a public right special injury over and above that suffered by the public should be proved, and therefore alleged by the plaintiff. Similar action can be brought in respect of rights in the nature of easement. It has been held in Lahore that a right to bury the dead in the land of another is not an easement and cannot, therefore, be enforced (*Jiwan Singh v. Karamdin*, 103 I. C. 678 Lah).

The person in possession of the dominant heritage, whether as owner or as occupier can bring the suit, but if the disturbance is of a permanent character, the owner of the heritage can also sue even though his tenant is in possession. Any one creating the disturbance is primarily liable in such a suit, but so long as the disturbance continues, the persons under whose direction it is created, the persons actually creating it and the persons who are responsible for its continuance are all equally liable, and all or any one of them can be made a defendant. But if a person other than the original creator of the disturbance is sought to be made liable, the suit should be preceded by a request to such person to remove the disturbance (*Penrudlock's case*, (1598) 5 Rep. 101, *Peacock on Easements*, p. 605). In every case, the liability of each defendant will have to be clearly specified. One of the owners of a dominant tenement can bring

2. At a partition held in 1910, the plaintiff became the owner of grove No. 514, and defendant of grove No. 513.

3. There is no other way from the highway to grove No. 514 except grove No. 513, hence the plaintiff claims a right of way for himself, his servants, cattle and carts from the highway to grove No. 514 and back, over grove No. 513].

4. The defendant on, or about January 1, 1925 unlawfully obstructed the said way by digging a ditch 3 feet deep between his grove No. 513 and the plaintiffs grove No. 514 and has thus caused substantial damage to the plaintiff by affecting the evidence of the said easement of way.

a suit to establish the right of easement and for removal of obstruction, and other owners need not be impleaded if they do not feel aggrieved (*Kedaruddin v. Samsur Mata*, 169 I. C. 771, 1937 Cal. 335).

Where in a common ridge forming the boundary between the land of the plaintiff and that of the defendant, the defendant's ancestor planted trees on his side of the ridge and the roots of those trees in course of time have furrowed into the plaintiff's side of the ridge and as a result new trees sprang upon the plaintiff's side as well, the defendant cannot claim any right either by the statute of limitation or under the law of prescription to the trees springing up and growing on the side of the plaintiff's land though the roots of the trees might have spread into the plaintiff's land for over 20 years. Nor can the imperceptible penetration of the roots over a long period amount to trespass as conceived in law as trespass is a direct entry into the land of another. Where the roots of a tree entered into the lands of both parties and derive nourishment from both the trees must be held to be common property of both. Where, therefore, the roots of the trees originally planted by the defendant's ancestor are found to have penetrated into the plaintiff's land and fresh trees have spring up on the latter at a result thereof, it must be held that such trees are the common property of both parties and the defendant cannot claim exclusive title to them so as to be entitled to go on that land of the plaintiff and cut them as his own. (*Raghunath Patnaik v. Oullabha Behera*, A. I. R. 1951 Orissa 181).

Limitation : For compensation was two years, as provided by Art. 36, under the Act of 1908 from the date of disturbance, or if the case came under Arts. 37 and 38 it was three years, and for injunction it was six years provided by Art. 120, under the Act of 1963 the residuary article 113 will apply. In case of suits to restrain the disturbance by injunction, Sec. 23, Limitation Act, (Art. 22 of Act of 1963) will be a great help as the obstruction is a continuing wrong. But it must not be forgotten that if the easement is claimed on the ground of prescription, and it is contested, it will not be upheld unless the plaintiff can prove user within two years of the suit (Sec. 15 Easement Act; *Aktat v. Collector of Bareilly*, 1933 A. L. J. 516, 1933 All. 623). Therefore in case of a

The plaintiff claims—

(1) Rs. 200 as general damages.

(2) An order to the defendant to fill so much of the said ditch as would reserve to the plaintiff the right of way which he has been enjoying.

(3) A perpetual injunction to restrain the defendant from the repetition or continuance of the act complained of.

No. 183—Ditto, Statutory form

(Form No. 25, Appendix A, C. P. C.)

(Particulars of the right claimed and the obstruction are not given and paragraph 2 is only an inference of law. This form is, therefore, defective.)

1. The plaintiff is, and at all the time hereinafter mentioned was, possessed of [a house in the village of].

complete obstruction to such easement a suit should be brought within two years. Explanation 2 to Sec. 15 of the Easement Act lays down three conditions for an interruption to be effected and they are (1) It must cause actual cessation of the enjoyment of the claimant. (2) The obstruction causing the interruption must have been placed, provided or raised by some one other than the claimant himself. (3) The claimant must be proved to have submitted or acquiesced in the interruption for one year after the claimant had notice thereof. The obstruction must have been continually for a period of one year. In computing the statutory period of twenty years required for perfecting the right of easement, the periods of obstruction which fall short of one year should also be taken into consideration. (*Natwar Lal Godhan Dass v. Shan Sinhji*, A. I. R. 1951 Saurashtra 35).

Court-fee : The valuation of a suit for injunction is that put upon it by the plaintiff himself. But in U. P. such suits should be valued at not less than one fifth of the market value of the property involved in or affected by the injunction or Rs. 200 whichever is greater.

(k) The right of way may be public or private. Private rights of way are vested in private individuals or owners of particular tenements, and such rights arise from grant or prescription or necessity. Public rights exist in favour of all the members of the public and their origin is dedication. A third kind of right, intermediate between the two, may arise by custom in favour of particular class of the public. That is called a customary right. When the right is alleged to have been acquired by prescription it must be proved to have been enjoyed as "of right" within the period prescribed by Section 15 of the Easements Act. (*Sajjad Ali v. Shabid Ali*, 1950 All, 316). Before a right of way can be acquired

2. He was entitled to a right of way from the (house) over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants (with vehicles, *or*, on foot) at all times of the year.

3. On the day of 19 , defendant wrongfully obstructed the said way, so that the plaintiff could not pass (with vehicles, *or* on foot, *or* in any manner) along the way (and has ever since wrongfully obstructed the same).

4. (*State special damage if any*).

No. 184—Suit for obstruction to a highway

1. The road leading from the Church to the Railway station at Muaffarnagar is a public highway.

2. The defendant heaped *kakar* in the middle of the said road in front of the Civil Surgeon's house so as to obstruct the said highway.

as an easement it is necessary to prove that (1) there has been an actual enjoyment of the right; (2) that the enjoyment has been open; (3) that it has been peaceful; (4) that it has been as of right; (5) that it has been as an easement; (6) that the easement was enjoyed without interruption and that it has been enjoyed for twenty years. Unless all these ingredients are proved no right of easement can accrue to the owner of a dominant heritage. Long user of a right of way raises a presumption in favour of the person using the way that the enjoyment has been as of right when there is no evidence to rebut this presumption it must be held that the enjoyment has been as of right. (*Phool Chand v. Murari Lal*, A. I. R. 1951 M. B. 89). *Prima facie* the grant of a right of way is the grant of a right having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used, and both those circumstances may legitimately be called in aid in determining whether it is a right restricted to foot passengers only or a general right of way for animals, carriage and everything else (*Hastimal v. Bachhraj*, 1952 B. L. W. 191). Thus a right of way does not necessarily include a right to take a marriage or funeral procession. If such a right is claimed it must be specifically pleaded. (*Ganga Sahai v. State*, 1964 A. L. J. 617).

The plaintiff must show in the plaint the mode by which he claims to make out a right of way e.g., by prescription, by grant, or by necessity, etc. It is not sufficient to use these words merely, but facts must be alleged from which the particular kind of easement can be inferred. The kind of way claimed should be specified. *i.e.*, whether for pedestrian traffic or for cattle or carts, etc. The qualification of the right, *i.e.*, whether enjoyed at particular seasons or at all times, should also be alleged. The termini of the way, if

3. The plaintiff while lawfully passing over the said highway fell over the *kankar* and sustained personal injuries and incurred loss and expense.

Particulars of injuries and damages.

* * *

The plaintiff claims Rs. 600, with interest from date of suit to that of payment.

[For a representative suit, see under "Nuisance."]

it is a private right, must also be indicated, but this is not necessary in the case of a public right. Where there are no termini—*i.e.*, a point of arrival and a point of departure, such as in a blind lane, there can be no right of way (*Pandu v. Laxman*, 1937 Nag. 322).

The infringement of the right must next be shown. In the case of a private right, obstruction alone is sufficient, but in the case of a public right some special damage over and above that suffered by the rest of the public must be alleged, with particulars and details of that damage, otherwise there will be no cause of action (*Shyamlal v. Man Math*, 51 I. C. 324 Cal.; *Sivashankar v. Muthu Swamy*, 25 I. C. 603 Mad.; *Surandra Kumar v. Dist. Board, Nadia*, 1942 (Cal.) 360; *Ram Gulam v. Ram Khelawan*, 1937 (Pat.) 481; *Sitaram v. Puttolall*, 1937 (Oudh) 456, 170 I. C. 495). The Madras and Lahore High Courts have, however, held that the English rule that no suit can be brought by a person who has not suffered special damage does not apply to India (*Mani Sami v. Kupusami*, 1939 (Mad.) 691; *Ghulam Rasul v. Ali Baksh*, 1936 (Lah.) 132, 161 I. C. 457; *Municipal Committee, Delhi v. Md. Ibrahim*, 152 I. C. 850, 1935 (Lah.) 196), and it has been held by the Patna High Court that a person in immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action irrespective of proof of special damage (*Pahlad Maharaj v. Gauri Datt*, 171 I. C. 933, 1937 (Pat.) 620; *Dasrath v. Narain*, 1941 (Pat.) 249, 192 I. C. 760; *Dalgobinda v. Khatu*, 1948 Pat. 183). What is a special damage is a question of fact. The diminution of the width of public way so as to prevent plaintiff turning his cart as he used to do before has been held to be a special damage (*Bhagwandas v. Town Magt*, 1929 (All.) 767). But village pathway is not a public right in the full sense but only a quasi-public right and a person can sue in respect of it as a member of the limited class whose special rights have been infringed, and no special damage is necessary to be proved (*Haris Chandra v. Haris Chandra*, 1923 (Cal.) 620; *Suresh v. Jamini*, 1926 (Cal.) 1119, 96 I. C. 711; *Ramdahin v. Parmeshar*, 1940 (Pat.) 160; *Bibhuti Narayan Singh v. Gura Mahadev*, 1940 (Pat.) 449, 19 Pat. 208; *Dalge'inda v. Khatu*, 1948 Pat. 183; *Faquir Chand v. Sooraj Singh*, 1949 All. 467). In order to establish a village pathway it should be proved that it was used by people as inhabitants of the village and not as members of the public (*Harisadhan v. Radhika Pd.*, 1938 (Cal.) 202, 173 I. C. 252). Suit can also be instituted on behalf of all members of

No. 185—Ditto, Statutory form*(Form No. 26, Appendix A, C. P. C.)*

The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones (*or* into the said trench) and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

No. 186—Suit for obstruction to the right of flow of rain water and dirty water (1)

1. On the west of the plaintiff's house in mohalla Goala Sarai, in the town of Aligarh, lies a vacant piece of land belonging to the defendant.

2. In the western wall of the said house there was a *mori* (or an outlet for water) which discharged the water of the plaintiff's latrine on the ground floor, on to the said land of the defendant. On the roof of the plaintiff's house there were three *parmalas* or spouts through which the rain water from the roof of the plaintiff's house used to be discharged on the defendant's said land.

the class to which the right belongs under Order 1, Rule 8, C. P. C. (*Bibuti v. Guru*, (*ibid*)). But where no suit can be instituted by an individual without proof of special damage, he cannot institute it even under Order 1, Rule 8 on behalf of the public or other persons unless he can prove special damage to the latter (*Surendra Kumar v. Dist. Board, Nadia*, 1942 (Cal.) 360). In any case a suit in respect of a public highway can be brought under Sec. 91, C. P. C.

Defence : The defendant may plead that the plaintiff's user was permissive or secret and cannot, therefore, give a prescriptive right, or there is another way possible, hence no easement of necessity arises. He may show that the plaintiff's way has not been substantially obstructed as he can still pass over the land. There can be no right of wandering all over a large plot of land and if a small way is left, which is quite sufficient for the plaintiff's purposes, there can be no cause of complaint (*Goluck v. Tarinee*, 4 W. R. 49; *Doorga v. Kalley*, 7 C. 145).

(1) A right of higher land to discharge rain water on lower land is a natural right. A proprietor of land on a higher land is entitled to collect the water falling on his land and to drain it on to his neighbour's

3. The plaintiff had been discharging the said latrine water and the rain water from his said house through the aforesaid *mori* and *parnalas* respectively on to the said land of the defendant for over 20 years before the defendant's obstruction hereinafter alleged, as of right and without interruption.

4. On or about June 15, 1924, the defendant has built a wall on the said land close to the western wall of the plaintiff's said house and has thus obstructed the flow of the said water of the plaintiff.

5. In consequence of the said act of the defendant, the water of the plaintiff's latrine could not flow out and became stagnant and has been a source of great discomfort to the plaintiff and injury to his health, and has thus caused substantial damage to the plaintiff.

The plaintiff claims—

(1) An order to the defendant directing him to remove his wall in such a way as not to obstruct the flow of the plaintiff's said water.

(2) A perpetual injunction to restrain the defendant from a repetition of any act calculated to obstruct the flow of the said water.

(3) Rs. 100 as general damages.

land on a lower level by making *moris* in his boundary wall. (*Gibbons v. Lenfesty*, 1915 P. C. 165). But the upper proprietor has no right to increase the burden on the neighbour's land by discharging the water with greater force and in a more accumulated form than it would have received if the water had been allowed to flow in a natural way, (*Tej Kishen v. Akhlaq Husain*, 1949 All. 184). A right to discharge such water through an artificial contrivance such as a spout is one which can be acquired as an easement. The right of throwing filthy water on neighbour's land can also be acquired as an easement (*Ramasubbier v. Mohomed*, 1937 (Mad.) 823). If an easement to flow or discharge such water is established, the plaintiff can claim not only to have the obstruction to such right removed but also damages resulting from the obstruction. It is no defence that the plaintiff can discharge the water more conveniently towards another direction, but it is a good defence to a suit for closing new spouts that they do not impose an additional burden on the servient heritage (*Sakharam v. Sakharam*, 20 N. L. J. 99).

No. 187—Suit for obstruction to light and air (m)

1. The plaintiff is, and at all material times hereinafter mentioned was, the owner in possession of a dwelling house bounded as follows in Raja Ki Mandi in the town of Agra, having windows on the west side thereof :—

Boundaries of the house

* * *

2. He has been enjoying the use of light and air to, and for the said house through the said windows, for a period of over 20 years before, and up to , the time of the obstruction hereinafter complained of, as of right and without interruption.

3. The defendant, on or about January 1, 1925, erected a high wall near the said windows and has hereby completely prevented and obstructed the light and air from entering into the said house by the said windows, thus rendering the plaintiff's said house unfit for comfortable dwelling.

[Or, the defendant has, on or about January 1, 1925, erected a wall which has in a material degree diminished and obstructed the light and air from entering the said house by the said windows.

(m) It must be remembered that the easement of receiving light and air by prescription differs from other easements in this important point that a person does not acquire an absolute right to the whole amount of air and light which he has been enjoying. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surrounding (*Peter Charles Paul v. William Robson*, 12 A. L. J. 1166, 42 C. 46, 18 C. W. N. 933, 27 M. L. J. 117, 16 M. L. J. 204, 1 L. W. 561, (1914) M. W. N. 631, 16 Bom. L. R. 803 (p. c.); *Rajani v. Nirmal*, 1946 (Cal.) 438), and no interference is actionable unless it is of a substantial character (*Wali Mohammad v. Batuk*, 163 I. C. 843, 1936 (All.) 517; *Abdulla v. Municipal Corpn., Karachi*, 1936 Sind. 39; 179 I. C. 884). He can claim no more air than is necessary and, under the Indian Easements Act, he can have no cause of action unless the diminution interferes with his physical comfort (Sec. 33, Exp. III), and such interference must be alleged in the plaint. It is not necessary that the obstruction should render the house insanitary, but where the Easements Act does not apply, *e. g.*, in Bengal, this would be necessary,

4. The plaintiff is a tailor by profession and used to carry on his business, as a tailor, in the said house. The said partial obstruction of light prevents him from carrying on his business, as such tailor, in the said house, as beneficially as he had been previously doing and the said obstruction to air materially affects the physical comfort of the plaintiff].

4. (Or 5). The said obstruction of the light and air has materially diminished the value of the plaintiff's said house. Formerly the house was worth Rs. 5,000 but now it is worth not more than Rs. 3,000.

5. (Or 6). The plaintiff has suffered damage by the said obstruction.

Particulars

Rs.

Rent of another house which the plaintiff had to take for residence and business since the said obstruction, for 5 months at Rs. 10 per month

50

as under the English Law a cause of action is not complete without proof of the fact. Similarly, mere diminution of light does not give a cause of action. It must be shown, and also alleged in the plaint, that either (1) the obstruction affects the evidence of the easement, or (2) it materially diminishes the value of the dominant heritage, or (3) it interferes materially with the physical comfort of the plaintiff, or (4) it prevents him from carrying on his accustomed business as beneficially as he had done previously (Sec. 33). If the last mentioned ground is taken, the plaint must show the business which the plaintiff was accustomed to do in the dominant heritage and how it is affected by the obstruction of light. In places where the Easements Act does not apply, the test is whether the obstruction amounts to a nuisance, and in such cases it should be alleged that the diminution of light has rendered the house unfit for comfortable habitation (*Delhi and London Bank v. Hem Lal Dutt*, 14 I. C. 39; *Heralal v. Mohondra*, 57 I. C. 706 Cal.). While therefore in States in which the Indian Easements Act is not in force a suit for disturbance of easement of light lies only when the disturbance amounts to a nuisance; in States to which the Act applies a suit lies even in other cases mentioned in Sec. 33. In a suit for injunction restraining the defendant from obstructing light and air of a window of the plaintiffs' house, the plaintiff must show that substantial injury is caused to his rights on account of the obstruction complained of. If he fails to prove the specific injury caused to him he cannot succeed on the mere presumption that by closing down of the disputed window, specific injury should be deemed to have been caused to the plaintiff. Such a

The plaintiff claims—

(1) A mandatory injunction to the defendant to demolish so much portion of his wall as obstructs the said light and air of the plaintiff.

(2) Rs. 50 damages.

(3) Future damages at Rs. 10 a month up to the day the obstruction is removed.

(4) In the alternative, Rs. 2,000 damages, for depreciation in value of the house.

presumption cannot be raised in view of the language of Sec. 33 and 35, Easements Act. The spreading of the smoke in the kitchen of the plaintiff cannot be taken into account in judging whether substantial injury is caused to the plaintiff by the closing of the window. (*Jamna Das v. Gulraj*, A. I. R. 1952 Rajasthan 1). The view of law expressed by the Allahabad High Court in *Dwarka Prasad v. Bishambhar Dayal*, 99 I. C. 5 that there is no infringement unless the act amounts to a nuisance is not, it is submitted, absolutely correct so far as Uttar Pradesh is concerned, and it seems to have been overlooked that the Privy Council ruling which has been followed in this case related to a case from Bengal where the Indian Easements Act is not in force. As to when a plaintiff can get damages, when injunction and when both, see *Mt. Panna v. Ram Saran*, 1933 (All.) 492, 1933 A. L. J. 1006, 145 I. C. 530; *Ellerman v. Pazundang*, 1933 (Rang.) 351). No such easement can be claimed through an aperture in a joint wall (*Narayan v. Shankar*, 174 I. C. 944, 1938 (Bom.) 215, 40 Bom. L. R. 115). If the case is based on obstruction affecting the evidence of easement, the obstruction should be specially alleged. Damages can be awarded for such obstruction (e.g., blocking of one of the windows) even if it does not cause any diminution of light and air and no actual damage (*Sofia Bibi v. Vasudev*, 1940 (Mad.) 952).

Where in a suit for a declaration that the defendant has not acquired any right of easement of light and air over the plaintiff's plot, the plaintiff contends relying on Sec. 16 of the Easements Act and Sec. 25 of the Limitation Act 1963 that the period during which the tenants of the plaintiff and his predecessors were occupying the plot should be excluded in computing the prescriptive period, it is necessary for the plaintiff to plead and prove the leases and their terms and their determination within three years of the suit (*Gaja Dhar Rud Mal v. Ramawatar*, 1952 N. L. J. 210, A. I. R. 1952 Nag. 103).

Defence : The defendant may plead that the interference to the plaintiff's right is not sufficient according to the above standard or, in a suit for mandatory injunction (but not in one for damages), that the suit has not been brought promptly and the plaintiff has been guilty of laches (*Sultan v. Rustamji*, 20 B. 704; *Benode v. Sondaminery*, 16 C. 252), and may raise any of the general pleas relating to easements. He may plead that, in any event, the whole of the obstruction need not be removed,

No. 188—Suit for interference with a right of privacy (n)

1. The plaintiff is, and at all material times hereinafter mentioned was, the owner of the house bounded as follows in Mohalla Maithan in the town of Agra, and has, since its construction, more than 50 years ago, been using it as a dwelling house for himself and his family members, including ladies.

2. The ladies of the plaintiff's household observe complete *pardah* and do not appear before the public, and they have been enjoying this seclusion from outsiders, while residing in the said house.

3. The defendant has, on or about February 1, 1924, built a room on the upper storey of his house to the east of the said house of the plaintiff, and in the western wall of the newly built room he has opened three windows overlooking the residential rooms, the courtyard and the kitchen of the *Zanana* portion of the plaintiff's said house.

The plaintiff claims—

(1) That a mandatory injunction be issued to the defenddant to close the said windows.

as plaintiff is not entitled to the whole light and air but only a small portion would be enough for him. Mere existence of other sources of light is no defence unless the plaintiff has acquired a prescriptive right to light from those sources (*Jadooie v. Kisum*, 105 I. C. Pat 39; *Mohamed Zaman v. Malikumar*, 165 I. C. 291, 1936 (Lah.) 792).

(n) There is no inherent right to privacy but such a right can be acquired by prescription, grant or local usage (*Kesho v. Mt. Muk-takiran*, 1931 (Pat.) 212, 133 I. C. 163); as to a local custom see Sec. 18, Easements Act. Such a custom has been held to exist in Gujrat and the Punjab in favour of private apartments of houses, though not in respect of open courtyards outside the houses (*Keshoav v. Ganpat*, 8 B. H. C. 87; *Nathubai v. Chhaganlal*, 2 Bom. L. R. 454; *Yasin v. Gokil Chand*, P. R. No. 19 of 1882). The Madras High Court does not recognize this right. The Calcutta High Court is also against such a right and holds that the right cannot exist independently of prescription, grant or local usage. The Allahabad High Court and the Oudh Court have held that a customary right of privacy exists in the U. P. (but see *Contra* : 1963 All. 240) but the plaintiff has to prove, and also to allege in the plaint, that the privacy in fact and substantially exists in the particular case, and has in fact been enjoyed, and also

(2) That an injunction be issued to restrain the defendant from doing any act in invasion of the plaintiff's right of privacy attached to the said house.

No. 189—Suit for diverting a water-course

(Form No. 27, Appendix A, C. P. C.)

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the _____, in the village of _____, district of _____.

2. By reason of such possession the plaintiff was entitled to the flow of the stream, for working the mill.

that the defendant's act substantially interferes with such privacy (*Gokul v. Radha*, 10 A. 358; *Mt. Janki v. Bhagwan Din*, 94 I. C. 914, 29 O. L. J. 136) and without such allegations of the existence of the customary right and of his right to the advantage of it the suit will fail (*Bhagwandas v. Zamarrud Hussain*, 51 A. 986). The Oudh Court, has however held that the custom is so well established in these provinces that the courts are entitled to take judicial notice of it (*Baqridi v. Rahim Bux*, 93 I. C. 332, 1946 (Oudh) 352). Later Allahabad rulings have also taken the same view as Oudh (*B. Nihal Chand v. Mst. Bhagwan Dei*, 1935 All. 1002 and *Mst. Daropadi Devi v. S. K. Dutt*, 1957 All. 48). The fact that the houses are separated by a public road does not prevent the existence of a right of privacy (*ibid.*; *Sardar Husain v. Ahmad Husain*, 110. I. C. 693 Oudh). The plaintiff has to prove that he has been enjoying the right of privacy. So where his premises are already overlooked from the roof of the defendants house as well as other adjacent houses he cannot claim a right of privacy and cannot complain of further invasions (*Shib Lal v. Ram Narian*, 3 I. C. 88 All; *Mst. Karimannissa v. Mira Bux*, 1929 All. 809). But on the ground that looking out of a window does not attract the attention of the inmates of the plaintiff's premises to enable them to seclude themselves, while looking from the roof does, it has been held that even if a house is overlooked from other sides, the opening of additional apertures would nevertheless be an infringement of the right of privacy and may be restrained. (*Kunj Behari v. Brij Behari*, 1947 Oudh. 139; *Abdul Rahman v. Bhagwandas*, 29 All. 582). The right is not restricted to Indians alone, but it has been recognized even in favour of European ladies (*Abdur Rahman v. D. Emile*, 16 A. 69); but not in favour of males (*Bhullan v. Altaf*, 1945 (All.) 335). Privacy cannot be claimed in respect of a garden, a court-yard or verandah not intended for being secluded from observation or in respect of an extensive vacant site on the ground of its being used as an open air privy and bath. (*Jiv-
raja v. Keshov Ji*, A. I. R. 1952 Kut. 22).

Such a suit can be brought either by the owner or by the lessee of a house.

All that the plaintiff can claim is the protection of this right and if the same can be secured without total removal of the offending

3. On the day of 19 , the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

**No. 190—Suit for obstructing a right to use water
for Irrigation**

(Form No. 28, Appendix A, C. P. C.)

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc. and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

construction, it is not necessary to order total removal (*Fazal Haq v. Fazal Haq*, 26 A. L. J. 49). The court will always take into consideration the extent and degree of privacy to which the plaintiff is entitled under the circumstances of a particular case (*Sardar Husain v. Ahmad Husain*, 110 I. C. 693).

Defence : The defendant may show that the right of privacy has not been substantially enjoyed by the plaintiff as plaintiff's house is overlooked from several other houses in the neighbourhood (*Shib Lal v. Ram Narayan*, 3 I. C. 88; *Mt. Karimunissa v. Mira Bakesh*, 119 I. C. 834, 1929 (All.) 809), or that the interference is not substantial. It was held in *Abdul Rahman v. Bhagwandas*, 29 A. 582, 4 A. L. J. 445 that it is no justification for the defendant opening windows and apertures in a wall newly built by him towards the plaintiff's *Zanana* house, that formerly, when there was no building on the defendant's upper storey, the plaintiff's house was visible from the defendant's roof for an aperture would permit a person to look in without being observed which could be guarded against from an open surface. But in the later case of *Shib Lal v. Ram Narayan*, 3 I. C. 88 All. this view was not accepted, and the Oudh Chief Court expressly dissented from this view (*Brij Bihari v. Kunj Bihari*, 1945 (Oudh) 308). It is no defence that the plaintiff can help himself by raising his own walls. It is no defence that house is already overlooked on other sides (*Kunj Behari v. Brij Behari*, 1947 Oudh 139). But the right of privacy cannot be carried to an offensive length.

FALSE IMPRISONMENT (o)**No. 191—Suit for false imprisonment**

1. The defendant No. 1 is an Executive Engineer employed in the Irrigation Department, and was on November 14, 1924, encamping at Bagrasi in the district of Bulandshahr.

2. On November 14, 1924, the plaintiff was passing near the tent of the defendant No. 1 when the said defendant No. 1 arrested and detained the plaintiff for two hours and afterwards gave him into the custody of defendant No. 2 who is a Police Sub-Inspector at Siyana, on a false charge of having abused the son of defendant No. 1.

3. The plaintiff offered to give his correct name and address to the defendant No. 2, and to execute such bond to appear before a magistrate as the said defendant No. 2 directed, but the said defendant No. 2 refused to release the plaintiff, and took him in custody to Bulandshahr and after keeping him in wrongful confinement for 26 hours produced him

(o) Restraint of the liberty of a person without lawful excuse is false imprisonment. It must be shown that the plaintiff was arrested or detained, either by force or by show of force or authority, without any lawful excuse or authority. The arrest is wrongful and actionable if it is made without authority of law, and without a warrant, or by an illegal warrant or by a legal warrant executed in an unlawful manner, and all that should be alleged in a suit for false imprisonment are facts showing that imprisonment was unlawful. It is not necessary to prove that it was made maliciously. The motive for the arrest need not therefore be alleged in the plaint. Judicial Officers are exempt from liability for what they do in the discharge of their judicial duties, provided they, in good faith, believe they have jurisdiction to do the act (Act XVIII of 1850). But want of jurisdiction and absence of good faith and want of reasonable and probable cause, if proved will make even a Judicial Officer liable (*Prabhad Das v. Walt*, 10 B. H. C. R. 346), AIR 1966 M. P. 273) and therefore these should be alleged in a suit against a Judicial Officer (*Girdhari v. Jagan*, 10 Bom. H. C. R. 182). If he acted within his jurisdiction even malice will not make him liable (*Girija Shankar v. Gopalji*, 30 B. 241).

The defence or justification of the defendant should not be forestalled by the plaintiff in the plaint. The plaintiff should simply give the facts of his arrest or imprisonment and, if it was made by a public officer, facts showing that he had exceeded his authority.

The private person who moves a public officer to arrest or imprison

before the Sub-Divisional Magistrate of Bulandshahr. The said Magistrate on November 16, 1924 discharged the plaintiff from custody on the plaintiff executing a personal recognizance to appear when called upon.

The plaintiff claims Rs. 1,000 as general damages for disgrace, humiliation, physical discomfort and mental suffering.

a wrong person is liable if he has taken an active part in such arrest or if he obtains the warrant fraudulently and improperly. But if the defendant has placed all the facts before the officer having the discretionary power to order such arrest he is not responsible if the officer with full knowledge of all the facts, exercised his discretion and ordered the arrest (*Thakdi Haji v. Budrudin*, 29 M. 208; *Sewel v. N. T. Co.*, K. B. 557; *Balbhaddar v. Basdeo*, 29 A. 44; *Graham v. Henry Gidney*, 60 C. 955, 1933 (Cal.) 708). In such cases, if the plaintiff has been prosecuted unsuccessfully, a suit for malicious prosecution will lie. The distinction between these two kinds of suits should be carefully remembered; if a man himself arrests or moves a ministerial or police officer to arrest another, he may be liable for false imprisonment, and the plaintiff will be entitled to a decree without proof of malice or want of reasonable or probable cause. It will be for the defendant to prove facts justifying the arrest and the existence of reasonable and probable cause, if the same is a justification. But if the defendant has made a charge before a Magistrate or a Judge, and the latter has ordered the arrest of the plaintiff, or has remanded him to custody, the defendant is not liable for false imprisonment, but may be liable for malicious prosecution, in which case the plaintiff has to allege and prove not only his prosecution and the injury resulting from the same, but also that the defendant acted maliciously and without a reasonable or probable cause in prosecuting him (*Nagendra v. Basanta*, 57 C. 5). The reason is obvious; imprisonment is a tort, unless justified; prosecution is not a tort, unless it was malicious and made without a reasonable or probable cause (*Austin v. Dowling* L. R. 5 C. P. 534, 540; *Hicks v. Faulkner*, 8 Q. B. D. 167, 170). In order to succeed in a suit for damages for wrongful arrest and detention, it is not necessary for the plaintiff to prove malice and want of reasonable and probable cause on the part of the defendant in causing his wrongful arrest and detention (*Lalta v. Asharfi Lal*, 1948 Oudh 135). If a man arrests another or causes a constable to arrest him and then unsuccessfully prosecutes him before a Magistrate, that is a case both for false imprisonment and malicious prosecution and the elements necessary for supporting and claim on each ground should be mentioned in the plaint. In such cases damages may be separately assessed and claimed for each act of tort (*Nurkhan v. Jiwandas*, 99 I. C. 638, 1927 (Lah.) 120). Exemplary damages are allowed for humiliation and indignity even if no inconvenience or discomfort is suffered (*Sant Das v. Province of Sind*, 1954 (Sindh) 93).

No. 192—Suit for moving a police officer to make arrest

1. On October 14, 1924, the defendant made a false report of theft against the plaintiff at the Budaun *Kotwali* police station and requested the Sub-Inspector in charge of the said police station to arrest the plaintiff.

2. On the said report and the said request of the defendant, the said Sub-Inspector arrested the plaintiff, on October 15, 1924, and kept him in the lock up for 24 hours, after which the said Sub-Inspector released the plaintiff.

The plaintiff claims Rs. 2,000 general damages.

status is a relevant factor in assessing damages *Nihal Singh v. Partap Singh* 1965 A. L. J. 805

Limitation : One year from the time when the imprisonment ends (Art. 73). For malicious prosecution the limitation under Art. 74 is one year from the date of acquittal or termination of the prosecution.

Defence : Facts justifying the act, *e. g.*, that the defendant acted in defence of his property on which the plaintiff was trespassing or that he acted in discharge of his official duties or under order of a superior officer, may be pleaded. Arrest and imprisonment by public officers can be made only in certain specified circumstances (*e. g.*, a police officer can arrest without a warrant in cases, mentioned in Secs. 54, 55, 57, 64, 65, 480 and 485, Cr. P. C. and Sec. 34, Police Act). If the defendant is a public officer, he must allege all facts showing that his act was within his legal powers, with such particulars as may be necessary. If the defendant seeks protection of the Judicial Officer's Protection Act, he must show—(1) that the imprisonment was ordered by him in discharge of his official duties, and (2) that the order was made within the limits of his jurisdiction, or, if not within those limits, that he, at the time, in good faith believed himself to have jurisdiction to make the order. The existence of a reasonable cause for the act complained of supplies the ground for the existence of good faith (*Robini Kumar v. Niaz Mahommad*, 1944 (Cal.) 4). If the defendant is a police officer he may plead that he acted under authority of a warrant issued by a Magistrate (Sec. 43, Police Act). Punjab Excise Act (Sec. 57) and the Bombay Police Act (Sec. 140) also afford certain protection to Government Officers. A private person's powers of arrest in India are more defined and restricted than in England, and the general law on the subject is to be found in Sec. 59, Cr. P. C. The only defence of a private person can therefore be either that the plaintiff was a proclaimed offender, or that the plaintiff had committed a cognizable and nonbailable offence in his presence, *Nazir v. Rex*, 1951 All. 3. If the offence was not committed in his presence the arrest cannot be justified, even if the offence

No. 193—Suit for arrest before Judgment (p)

1. The defendant instituted a suit No. 141 of 1924 in the Court of the Munsif at Muzaffarnagar, against the plaintiff for recovery of Rs. 200.

2. In connection with the said suit, the defendant obtained an order of arrest before judgment on January 15, 1924, from the said court, on the allegations that the plaintiff was going to leave India and had no property in India.

3. The aforesaid allegations were false, as the plaintiff had no intention to leave India and owned and still owns two purcca built houses worth Rs. 50,000 at Meerut.

4. The defendant obtained the said order maliciously and without any reasonable or probable cause.

5. The plaintiff was arrested in pursuance of the said warrant, and was released, on furnishing security, after 12 hours.

6. The plaintiff was, by the said arrest, considerably

has really been committed and even if the defendant has reasonable cause for suspecting it. An issue of a reasonable and probable cause is therefore immaterial in such cases (*Gauri Prasad v. Chartered Bank*, 1925 (Cal.) 884, 52 C. 615). If however, a private person moves a police officer to arrest another person, and the police officer arrests the latter, not on his own responsibility and not after his own investigation and the exercise of his own discretion, but on the motion of the private person alone, the latter must prove that he had reasonable ground for suspecting that the person arrested had committed an act for which the police officer was entitled to arrest him and, in making this allegation, should give particulars of the reasonable and probable grounds. In the case of *Gauri Prasad v. Chartered Bank Supra.*, Page, J. however went further and held that even the existence of a reasonable and probable cause will be no justification when the offence was not committed in the defendant's presence because the arrest by a police officer in the presence of and at the instigation of the defendant should be regarded as arrest by the defendant himself which could not be made except under Sec. 59, Cr. P. C. But in any case, if the police officer makes the arrest after making his own investigation, the mere fact that he did so on the report of the defendant would not make the defendant liable (*Balbhaddar v. Basdeo*, 29 A. 44).

(p) See note (e) ante about attachment before judgment. The same applies *mutatis mutandis* to arrest before judgment.

disgraced and has suffered damage to his credit and reputation.

The plaintiff claims Rs. 1,000 as damages.

FRAUD (q)

No. 194—Suit to set aside a decree on the ground of fraud (r)

1. The defendant has obtained a decree against the plaintiff from the Court of the Subordinate Judge of Monghyr (being decree No. 557 of 1923), on February 5, 1924

(q) Fraud and misrepresentation are acts of tort which give a cause of action provided they result in any damage to the plaintiff. If no damage is caused to the plaintiff, fraud or misrepresentation furnishes no cause of action. An actionable fraud or misrepresentation consists of the making of a wilfully false representation of a fact made with the intent that the plaintiff should act on it and of the plaintiff acting on it and suffering loss. A representation, if *bona fide*, is not actionable even if it was made negligently provided it was not made recklessly without caring whether it was true or false (*The United Motor Finance Co. v. Romar Dan & Co.*, 1937 (Mad.) 897). The object of a plaintiff in a suit on the ground of fraud is to be restored to the same position in which he was before the fraud was committed, or in which he would have been, had the fraud not been committed. This object may be achieved by a declaration of the invalidity of a transaction which is the result of fraud, by cancellation of a document, by rescission of a contract or by recovery of damages. Fraud must be specifically alleged with full particulars (*vide* Chapter VI, part I). It should be clearly alleged in the plaint that the particular transaction was the consequence of the fraud, and that the defendant is either the perpetrator of the fraud, or an abettor in its perpetration or one who has accepted some benefit under the fraudulent transaction.

(r) A court has jurisdiction to set aside a decree obtained by fraud and the defendant can bring a suit for the purpose, though if the fraud was committed on the court, the court can set aside the decree even under Section 151, C. P. C. without a regular suit (*Sreemati Savitri v. Savi*, 6 Pat. 108; See *Sadashiva v. Mahadeo*, 118 I. C. 61, 1929 (Nag.) 111; (*Keshav v. Subba*, 1939 (Bom.) 490) where it has been held that a decree passed in terms of award or by consent cannot be set aside under Sec. 151 on the ground of fraud. The plaintiff must show how, when, where and in what way the fraud was committed. "The fraud must be actual positive fraud, a mediated and intentional contrivance to keep the parties and the court in ignorance of facts of the case and obtaining that decree by that contrivance" (*Patch v. Word*, (1867) L. R. 3 Ch. App. 203; *Mahomed Hashim v. Iffat Ara*, 74 C. L. J. 261). Mere general allegations of fraud are not sufficient nor proof of constructive fraud or suspicion (*Laxmi Narain v. Mohd Shafi*, 1949 East Punjab, 141). If

2. The said decree was obtained by the defendant by fraud. The following are the particulars of the said fraud :—

(i) The defendant made a statement in the plaint that the plaintiff was a resident of village Talra, and got a summons issued against the plaintiff to village Talra. When the summons was returned unserved with the report that the plain-

fraud is practised on the court or the other party decree cannot be set aside on the suit of a third person who was no party to it on the ground that the decree-holder had practised fraud upon the latter (*Bishwamber v. Nilambar*, 125 I. C. 861, 1930 (Cal.) 263, 33 C. W. N. 997). *Ex parte* decrees, consent decrees and decrees obtained after contest are all liable to be attacked for fraud, the character of which will vary with the circumstances of each case (*Nanda Kumar v. Ram Jiban*, 41 C. 990, 18 C. W. N. 681, 19 C. L. J. 457, 23 I. C. 33). The plaintiff may show that he was prevented by any fraud practised by the defendant from appearing and contesting the claim, or that his consent to compromise was obtained by fraudulent misrepresentation. It is not sufficient merely to allege that the summons was not served on the plaintiff, (*Sekharan v. Krishnan*, 28 Travancore L. J. 184), but it must be alleged and proved that the defendant was responsible for suppressing the service or for having false return of service made (*Jawahir v. Neki Ram*, 13 A. L. J. 190; *Mahadeb v. Mahabir*, 1923 (Cal.) 569; *Narana v. Kojiram*, 1939 M. L. R. (113) (Civ.)); or was, by any fraud, kept back from coming forward and defending the suit. The contrivance should be clearly alleged as particulars of fraud. If, however, the defendant was aware of the suit and could, if he chose, come and defend it he cannot have the decree set aside on the allegation that the plaintiff practised fraud by making false allegations of title and producing false evidence (*Bai Kantha v. Prahlad*) 1926 (Cal.) 426, 88 I. C. 52; *Mohammed Yusif v. Nurjan*, 104 I. C. 805 Sind; *Kadirvelu v. Kuppuswami*, 41 M. 743, 34 M. L. J. 590, 23 M. L. T. 372, (1918) M. W. N. 514, 45 I. C. 774; *Badri Narain v. Parsoti*, 170 I. C. 146, 1937 (Pat.) 384; *Konda V. Palaniswami*, (1941) 2 M. L. J. 640). But the Court can go into the question whether a claim was false in order to determine whether the plaintiff really suppressed the service of summons on the defendant to obtain a decree on a false claim (*Ram Chandra v. Prahlad*, 101 I. C. 708, 8 P. L. T. 193; *Jagdeo Prasad v. Bhagwan Hajam*, 161 I. C. 474, 1936 (Pat.) 135; *Kunja Bihari v. Krishandhone*, 1940 (Cal. 489).

One who seeks to impugn a decree passed after contest takes on himself a much heavier burden, and it is not discharged by merely showing that the decision in the former suit was erroneous (*Nanda Kumar v. Ram Jiban Supra*). A decree cannot therefore be set aside merely because it was obtained on false and perjured evidence (*Kasiwar v. Amruddin*, 47 I. C. 14, 23 C. W. N. 133; *Janki v. Lachmi*, 13 A. L. J. 753; *Kumar Swami v. Kamalchi*, 23 M. L. J. 187, 16 I. C. 843; *Sher Bhadur v. Md. Amin*, 116 I. C. 330, 1929 (Lah.) 569), or that a false statement was made in the written statement by the defendant knowing it to be

tiff was not found at Talra, the defendant made an application, supported by an affidavit, alleging that the plaintiff was intentionally evading service, and praying for substituted service, and he obtained an order for service on the plaintiff by publication in "The Statesman."

false, as the fraud must be extrinsic to the proceedings in the court (*Ramnathan v. Palaniappa*, 180 I. C. 286, 1939 (Mad.) 146). But where there has been a wilful suppression of evidence and the evidence withheld is of such a character that, if it had been produced, the probabilities are that the court would have come to a different conclusion, a suit will lie to set aside the decree. **But the plaintiff should in such a suit give full particulars of the evidence withheld and how it would have produced a different result to the litigation** (*Bhikaji v. Balwant* 105 I. C. 296, 29 Bom. L. R. 1046, 1927 (Bom.) 510). If a plaintiff can show that the defendant prevented him by any contrivance from placing before the court in the former suit any material relevant to the issue, or if any subsequent discovery of evidence shows that there was any fraud, or that the court was misled in the former suit, the decree obtained even after contest can be set aside. (*Abdul Karim v. Laiq Ram*, 173 I. C. 954, 1937 (Rang.) 534). Where a lady was kept in the dark about proceedings before an arbitrator and when steps were taken to have the award filed, her pleader, without her knowledge, confessed judgment, it was held that fraud had been practised (*Umrao Begum v. Rahmat Ilahi*, 186 I. C. 77, 1939 (Lah.) 439). Merely giving wrong address for service which results in no service is not fraud (*Tarunanga Nath v. Prem Narain*, 1933 (Cal.) 274, 143 I. C. 710, 60 C. 98).

A decree cannot be set aside on the ground of mistake of fact or law (*Municipal Committee, Amritsar v. Harnam*, 9 (Lah.) 35; *Allabbux v. Nusserwanji & Co.*, 164 I. C. 43, 1936 (Sind.) 99) or on the ground that it was based on wrong principles (*Madivalapa v. Subappa*, 1937 (Bom.) 458).

But a suit to set aside a decree obtained by fraud practised by the plaintiff himself or both by the plaintiff and the defendant is not maintainable (*Shripal Gonda v. Govind Gonda*, 1941 (Bom.) 77, 193 I. C. 795; *Gudappa v. Balaji*, 196 I. C. 90, 1941 (Bom.) 274). If fraud has been carried out, in no case can a plaintiff who was a party to it, be allowed to plead his own baseness. But a plaintiff who was not a party to the fraud and does not plead through a party to the fraud can plead true facts and obtain relief, even if the transaction is a decree of the court. But where fraud has not been carried out, the plaintiff though a party to the fraud, can be permitted to state true facts. As regards the defendant the position is that even though he was a party to a fraud and fraud was carried out, he can state true facts and succeed in having the *Status quo* maintained in his favour. (*Md. Fazal Khan v. Abdul Rahim Khan*, 1950 N. L. J. 226).

A suit to set aside a decree on the ground of fraud may be instituted in any court in which a part of the fraud was committed *e. g.*, in a

The said statements of the defendant that the plaintiff was a resident of Talra and that he was evading service were false, were known by the defendant to be false and were made fraudulently to prevent the plaintiff from being inform-

court which served the summons, when the fraud was committed in connection with the service, or where the decree is executed (*Jawahir v. Neki Ram*, 13 A. L. J. 190). There is no objection to an inferior court entertaining a suit for setting aside, on this ground, a decree passed by a superior court (*Pilla v. Vedola*, 24 M. L. J. 254, 51 I. C. 536; *Chandi Prasad v. Govind*, 39 I. C. 791, I P. L. W. 499). The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case and obtaining the decree by the contrivance (*Nand Kumar Howaldar v. Ram Jiban Howaldar*, 1914 (Cal.) 232). A suit to set aside a decree on the ground that the decree in the previous suit was obtained by perjured evidence is not maintainable, (*Janki Kumar v. Lachmi Narain*, 1915 All. 400).

When a defendant applied under Order 9, Rule 13, for setting aside a decree because he was kept away from appearing on account of the fraud of the plaintiff, but did not deposit security as required by the Provincial Small Cause Court Act and his application was dismissed, it was held that he could bring a regular suit on the same grounds (*M. A. Maistry v. Abdul Aziz*, 104 I. C. 313, 5 R. 471, 6 Bur. L. J. 148). But when a small Cause Court had made an adjudication on merits a regular suit was held barred (*Musthana v. Mohendra*, 76 I. C. 794, 1 R. 500, 1924 (Rang.) 119).

Limitation for such suits is three years from the date when fraud becomes known to the plaintiff (Art. 59). The plaintiff should, therefore, mention the date of this knowledge in the plaint. If the defendant pleads limitation he must show plaintiff's knowledge anterior to that date (*Rahimbhoy v. Turner*, 17 B. 341 (P. C.)). If the decree is based on award, it cannot be set aside without setting aside the award, and the suit was therefore held to be governed by Art. 91 of the Act of 1908 (*Nidhan v. Sasoon*, 28 P. L. R. 106, 9 L. L. J. 191, 100 I. C. 596, 1927 (Lah.) 172). Now the article applicable will be 59. If a decree is not set aside by a suit within limitation it is binding even though it may have been obtained by fraud (*Premgir v. Wawa*, 184 I. C. 643, 1939 (Sind.) 151).

Relief claimed should be specifically for setting aside the decree. A declaration that the decree is not binding cannot be granted as the decree obtained by fraud is merely voidable and not void (as in the case of a decree passed without jurisdiction) and is perfectly binding until set aside (*Haji Munshi v. Khetra*, 30 C. W. N. 59, 1926 (Cal.) 167; *Perandbai v. Thomal*, 1926 (Sindh) 15, 88 I. C. 744; *Rajbans v. Askaran*, 1930 (Pat.) 227, 125 I. C. 113), nor can a suit be maintained for declaration that proceedings in execution of a decree are null and void (*Amar Singh v. Chhajjumul*, 108 I. C. 55 Lah.). Where the decree is against several persons including the plaintiff and is for a declaration that a certain *wakfnama* is invalid, the plaintiff might sue for a declaration that the

ed of the suit, and the plaintiff was thus kept ignorant of the institution of the suit. The plaintiff is a resident of village Sambalhera and has always been living there.

3. The plaintiff came to know of the fraud alleged in para. 2 above on March 10, 1925, when on receipt of a notice of execution he inspected the record of the original case.

The plaintiff claims that the said decree be set aside.

decree is nullity so far as he is concerned and is not binding upon him. It has been held in *Rajib Pande v. Lakhan*, 27 C. 11; *Bholnath v. Nagendra*, 110 I. C. 571, 1928 (Cal.). 810, and *Jamiruddin v. Khadejunissa*, 114 I. C. 407, 1929 (Cal.) 685, that party against whom a decree is set up can show, without having to bring a fresh suit, that the decree was obtained by fraud. The aid of Section 44, Evidence Act was taken in these cases.

The Consequence of the setting aside of a decree on the ground of fraud depends on the findings in the suit for setting aside the decree. If the whole proceedings are set aside as fraudulent, there is an end of the matter and the earlier suit cannot be continued. If, on the other hand, the decree has been set aside on the ground of suppression of summonses by means of fraud the first suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of according to law. (*Jagrup v. Ram Sabad*, 1942 Oudh 217; *Nirzan Singh v. Kishuri Singh*, 1931 Pat. 204 F. B.; *Bisesar Pathak v. Phaguni Mahton*, 1948 Pat. 33).

Valuation for purpose of jurisdiction is of course the amount of the decree and if the proper relief of setting aside the decree is prayed, court-fee will also have to be paid on the same amount. It has been held that even if the relief prayed is a declaration that the decree is null and void and not enforceable it should be regarded as a suit for declaration with a consequential relief, as the substance and not the form of the plaint should be looked to, and in that case also the fixed court-fee will not be sufficient but an *add valorem* fee will have to be paid on the amount at which the suit is valued for the purpose of jurisdiction (*Aruna Chalam v. Ranga Swamy*, 38 M. 922, 28 M. L. J. 118 28 I. C. 79, (1915) M. W. N. 118, 17 M. L. T. 154; *Deokali v. Kedar Nath*, 39 C. 701, 16 C. W. N. 838, 15 I. C. 427; *Hakim Rai v. Ishwar Dass*, 102 I. C. 46, 8 L. 531, *Nalininath v. Radha Shyam*, 1940 (Cal.) 482). In U. P. such amount should be the money or market value of the property secured or affected by the decree (S. 7 (iv-B) added by the U. P. Court Fees Amendment Act 1939).

Defence in such cases usually is a denial of the alleged facts or of their sufficiency to amount to fraud.

No. 195—Suit for setting aside a transfer made to defeat creditors (s)

1. The plaintiff No. 1 has a decree No. 515 of 1956, passed by the City Munsif at Varanasi, for Rs. 908 against defendant No. 1 and the plaintiff No. 2 has a debt of Rs. 600 and interest owing to him under a bond of August 4, 1958, from the said defendant No. 1.

[If there are other creditors also, add—several other persons whose names and addresses so far as known to the plaintiffs are given in the schedule attached hereto (Or, whose names are not known to the plaintiffs) (Or, several other persons, the names and addresses of some of whom are mentioned in the schedule attached hereto and the names of others are unknown to the plaintiffs) have also debts owing to them from the said defendant No. 1].

2. The plaintiffs bring the suit on behalf of all the creditors of defendant No. 1.

(s) Such a suit cannot be brought by the transferor himself after the fraudulent purpose has been carried out (*Mangal v. Bakhtawar*, 135 I. C. 244; *Kisan Ram v. Godawari*, 1940 (Pat.) 389, 189 I. C. 489; *Nagabhushan v. Seethama*, 18 Mys. L. J. 409; *Kalipada Mondal v. Kali Charan Mondal*, 1949 (Cal.) 204). Under Section 53, Transfer of Property Act, as now amended such a suit can be instituted only on behalf of, or for the benefit of, all the creditors. Therefore though one creditor may sue and though he is the sole and only creditor, yet he must do so for the benefit of all and should make this clear in his relief. (*Deokali v. Ramdevi*, 1941 (Rang.) 76, 193 II. C. 286). The plaintiff must allege their claims, the defendant's transfer, and the fact that it was made fraudulently with an intent to defeat or delay the claims. It must also be clearly alleged that the suit is brought on behalf of, and for the benefit of all the creditors, otherwise the suit will not be maintainable under Section 53 (*Faqir Bux v. Thakur Prasad*, 1941 (Oudh) 457, 194 I. C. 588). If all creditors are not joined, permission must be obtained under Order 1, Rule 8, C. P. C. for bringing a representative suit. If no such permission is obtained, the suit will not be representative in spite of an allegation in the plaint to that effect and the decision will be binding only on the actual parties to the suit even if it is not dismissed on the ground of non-maintainability (*Mt. Banto v. Firm R. S. Lala Shiva Prasad*, 1943 (Lah.) 96), but if all the creditors are parties to the suit no permission under O. 1, R. 8, is necessary (*Jaina v. Official Receiver*, 1946 (Mad. 25). If a suit is filed by the plaintiff in the belief that he is the only creditor, even the appellate Court can give him permission

3. With the intention of defeating the aforesaid claims of the plaintiffs, (or, the plaintiffs and the other creditors aforesaid) the defendant No. 1 has fraudulently transferred the whole of his immovable property, detailed below, by a deed of gift dated May 18, 1959, in favour of his sister's son, defendant No. 2.

4. The plaintiffs came to know of the said gift on July 20, 1959, when a notice of mutation was published in the village.

The plaintiffs claim that the said transfer be declared null and void against the creditors of the said defendant No. 1.

No. 196—Ditto, with alternative claim for a declaration that the transfer is sham

1. The plaintiff attached the house described below in execution of his decree No. 515 of 1958 of the Munsif's Court, Varanasi, against defendant No. 2.

(Description of the house).

2. Defendant No. 1 who is the wife of defendant No. 2 claimed the said house under a sale-deed, dated May 15, 1959, executed by defendant No. 2, and her claim has been allowed and the house released from attachment.

3. The said sale-deed is a sham and bogus transaction and does not convey any title to defendant No. 1.

4. Alternatively, the said sale was made by defendant No. 2 fraudulently with the intention to defeat or delay the claims of the plaintiff under the aforesaid decree.

to sue in a representative capacity (*Mandavil v. Krishna*, 1047 Mad. 194, 1946 2 M. L. J. 432, 1947 M. W. N. 732). It is not necessary that the creditor should be a judgment creditor, but any one who has a claim for which the transferor is legally liable can sue, *e. g.*, a Hindu wife who has been deserted by a husband has a legal claim for maintenance and is a creditor (*Meenakshi v. Ammani*, 101 I. C. 610 Mad.). Even a future creditor can sue on the allegation that the transfer was made on the eve of borrowing money from him in order to defraud him, though in that case the onus on him will be a heavy one (*Muhammad Ishaq v. Md. Yusuf*, 8 Lah. 544). But an auction purchaser in execution of a decree of the creditor cannot sue except when he is the decree-holder himself

The plaintiff claims a declaration that the said sale-deed is a sham and bougus transaction, or that it is null and void against the plaintiff, and therefore the said house is liable to attachment and sale in execution of the plaintiff's aforesaid decree.

No 197—Suit for procuring property by fraud

(Form No. 21, Appendix A, C. P. C.)

1. On the day of 19 , the defendant for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he the defendant, was solvent and worth..... rupees over all his liabilities].

2. The plaintiff was thereby induced to sell [and deliver] to the defendant sundry goods of the value of Rs.

3. The said representations were false [*or state the particulars of falsehoods*] and were then known by the defendant to be so.

4. The defendant has not paid for the goods. (*Or, if the goods were not delivered*). The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

(*Ram Ratan v. Akhatii*, 181 I. C. 181, 1939 (Oudh) 230; *Lalit Mohan v. Anil Kumar*, 43 C. W. N. 1136; *Bai Hakimbu v. Dayabhi*, 1939 Bom. 508, 185 I. C. 655). Preferring one creditor to another is not an act of fraud and a transfer made with that object cannot be set aside (*Ma Pwa v. S. R. M. M. A. Chettiar*, 561. A. 379, 7 R. 624, 34 C. W. N. 6, 1929 (P. C.) 279; *Bai Hakimbu v. Dayabhai*, *ibid*; *Bulagi v. Jaswant*, 42 P. L. R. 385). *Musahar Sahu v. Hakim Lal*, 14 A. L. J. 198 (P. C.); *Mina Kumari v. Bijoz Singh*, 15 A. L. J. 382 (P. C.).

The facts proving the transaction to be fraudulent need not be detailed in the plaint, but must be reserved for the trial. If the transaction was a sham and colourable one and not intended to take effect as a transfer, a suit need not be brought under Section 53, but the creditor may follow the property (*Bibi Sirab v. Mt. Golab Kuer*, 53 I. C. 892, 1929 (Pat.) 409; *Palaniandi v. Appavu*, 30 M. L. J. 565, 34 I. C. 778; *Prabhu v. Sarju*, 1940 (All.) 407, 190 I. C. 337). In fact in such cases a suit cannot be brought under Sec. 53 (*G. B. Subrayalu v. A. Rao*, 1945 (Mad.) 281). He may bring an alternative suit for declaration that the transaction is a sham or for having it set aside under Section 53. It was held in same cases that the frame of a suit seeking to set aside a transfer on the ground of being collusive and fictitious was defective *Prabhu v. Sarju*, *ibid*, *Mt. Rukaiya v. Radha Dishan* 1944

[*Relief claimed*]

**No. 198—Fraudulently procuring credit to
be given to another person**

(*Form No. 22, Appendix A, C. P. C.*)

1. On the day of 19 , the defendant represented to the plaintiff that *E. F.* was solvent and in good credit, and worth rupees over all his liabilities [*or that E. F. then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit*].

2. The plaintiff was thereby induced to sell to *E. F.* [*rice*] of the value of rupees [*on month's credit*].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff (*or, to deceive and injure the plaintiff*).

4. *E. F.* did not pay for the said goods at the expiration of the credit aforesaid, [*or, has not paid for the said rice, and the plaintiff has wholly lost the same*].

(*Relief claimed*)

**No. 199—Suit against a fraudulent purchaser and
his transferee with notice**

(*Form No. 33, Appendix A, C. P. C.*)

1. On the day of 19 , the defendant *C. D.* for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [*he was solvent, and worth rupees over all his liabilities*].

(All.) 214). This seems to be too technical a view and in a recent case Kerala High Court rejected such an attack *Onseph Skaria v. Cherian Joseph* A. I. R. 1965 Ker. 288). This is a suit for a declaration without a consequential relief for the purpose of court-fee. In such a case the transaction is set aside as a whole and a charge in favour of the transferee cannot be allowed even to the extent of the consideration which actually passed (*Raja Chaddhar v. Thirwengada*, 106 I. C. 651, 1928 (Mad.) 20).

2. The plaintiff was thereby induced to sell and deliver to C. D. [one hundred boxes of tea], the estimated value of which is rupees.

3. The said representations were false, and were then known by C. D. to be so [or, at the time of making the said representations, C. D. was insolvent, and knew himself to be so].

4. C. D. , afterwards transferred the said goods to the defendant E. F. without consideration [or, who had notice of the falsity of the representation].

The plaintiff claims—

(1) Delivery of the said goods, or rupees, in case delivery cannot be had.

(2) rupees compensation for the detention thereof [For other precedents of fraud, See "*Cancellation of instrument*"].

INJUNCTION (t)

No. 200—Suit for damages for wrongfully obtaining temporary injunction

1. On March 20, 1926, the defendant instituted a civil suit (No. 12 of 1926) in this Court against the plaintiff for recovery of possession on certain land, on which the plaintiff was constructing a house.

Limitation is 3 years under Art. 113. The starting point of limitation is the date on which the plaintiff comes to know of the circumstances entitling him to have the transfer avoided (*Venkateshwara v. Somasundaram*, 44 I. C. 551, (1918) M. W. N. 244). One of the Judges deciding the case of *Guntur v. Nayapati*, 1926 (Mad.) 66, 49 M. L. J. 616, 92 I. C. 405, disagreed and held that the limitation runs from the date the plaintiff exercises his option to avoid the transfer. It is, therefore, in any case proper to allege also the date of knowledge of the plaintiff.

Defence : The defendant transferee may show that he has taken the property for consideration in good faith, or that he was also a creditor and has taken in lieu of his debts. If the creditor once accepts a gift, e.g., impleading the donee in his suit, under Sec. 128, Transfer of Property Act, he cannot afterwards impeach the gift under Sec. 53 (*Sachitanand v. Radhapat*, 26 A. L. J. 524).

(t) Forms of suits for "injunction" will be found under "Easements," "Nuisance" and "Injunction." See note (e) which applies

2. On the same date, the defendant applied for and obtained a temporary injunction restraining the plaintiff from making any further construction until the disposal of the said civil suit. The said injunction was served upon the plaintiff on March 22, 1926.

3. The defendant's said civil suit was dismissed on December 12, 1926.

4. The said temporary injunction was applied for maliciously and without any reasonable or probable cause.

5. The plaintiff has thereby suffered damage.

Particulars

(i) The plaintiff has erected walls of three rooms to the height of 8 feet before the injunction was served upon him, and they all fell down during the rains. The labour and time were therefore wasted and the bricks were also damaged. It would now cost Rs. 200 to erect the walls to the same height, after utilizing serviceable bricks of the former wall.

(ii) The plaintiff was building the house for letting it on rent and the plaintiff has lost the rent of 9 months and 21 days at Rs. 20 p. m. Rs. 194

The plaintiff claims Rs. 394, with interest from date of suit to that of payment.

LEGAL REPRESENTATIVES (u)

No. 201—Suit by the executor or administrator of a deceased person

Before setting out the facts constituting the cause of

mutatis mutandis to these cases also. The right of such suits is recognized in *Bhutnath v. Chandra Benode*, 16 I. C. 433, 16 C. L. J. 34; *Har Kumar v. Jagat Bandhu*, 100 I. C. 318, 53 C. 1008, 1927 (Cal.) 247; and *Rama Rao v. Somasundaram*, 51 M. 642. It is not enough to show that injunction was applied for an insufficient grounds, it must also be proved that there was no reasonable and probable cause for applying for it and that the defendant was actuated by malice (*Bhupendra v. Trinayani*, 1944 (Cal.) 289). Also see *Ram Prtab v. Narain Singh* A. I. R. 1965 All. 172.

Limitation for such a suit is three years from the date when the injunction ceases (Art. 90).

(u) The English law maxim that a personal action dies with the

action for the suit, add].

“1. The plaintiff is the executor of.....deceased.”

Or

“2. The plaintiff is the son and legal heir of.... deceased, who died intestate, and has obtained letter of administration of the estate of the said.....from the court of.....”

**No. 202—Suit by any other legal representative
under Act XII of 1955**

[After setting out the facts constituting the cause of action for the suit, add.....].

1. The said wrongful act of the defendant has caused the following pecuniary loss to the estate of the said..... (specify the injury).

2. The said.....died on.....

3. The plaintiff is the brother and legal heir and representative of the said.....

person has been modified by *Philips v. Homfery*, (1883) 24 Ch. D. 439, to this extent that a suit for damages for a wrongful act is allowed to be brought or continued against the estate of the deceased wrong-doer when the property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys. This has been recognized in India also. For example, a suit for damages for trespass on plaintiff's colliery lies against the legal representative of the trespasser (*Pannalal v. Adjai Coal Co.*, 101 I. C. 62, 31 C. W. N. 82, 1927 (Mad.) 117). The maxim has further been modified in India by the provisions of Act XII of 1855 (Legal Representatives Act), Sec. 306, Indian Succession Act and Sec. 89, Probate and Administration Act. Under the provisions of the Succession Act and the Probate and Administration Act, all demands whatsoever, and all rights to prosecute or defend any suit existing in favour of, or against, a person at the time of his death, survive to, or against, his executors or administrators, except causes of action for personal injuries not causing death and except cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory. The words “Personal injuries” are not confined to physical injuries but wrongs such as defamation, malicious prosecution etc., are also included (*Punjab Singh v. Ram Autar*, 52 I. C. 348, 4 P. L. J. 676; *Rustomji v. Nurse*, 44 M. 357; *Motilal v. Har Narayan*, 47 B. 716). It should be noted that under these Acts, cause of action does not survive to an ordinary heir or legal representative but only to an “executor” or

No. 203—Suit against the executor or administrator
of a tort-feasor

[After setting out the facts constituting the cause of action, add.....].

1. The defendant is the _____ of the said..... deceased.

No. 204—Suit against a legal representative under
Act XII of 1855

[After setting out the facts constituting the cause of action for the suit, add.....]

1. The said.....died on.....

2. The defendant is the _____ of the said..... deceased.

“administrator”. Even if the cause of action does not survive in any case, Act XII of 1855 will permit a suit to be brought by the legal representative of any person for a wrong committed in the latter’s lifetime which has occasioned pecuniary loss to his estate, and similarly a suit can be brought under that Act *against* the legal representative of wrong-doer for any wrong for which the latter could have been sued. In the latter case, it is not necessary that the tort should have caused any pecuniary gain to the wrong-doer or loss to the other person. In both cases, the important condition is that the **wrong should have been committed within one year of the death** of the deceased person. Cause of action for a suit for damages for breach of trust survives against the heir as it is not a case of mere tort from a duty (*Sri Chandra v. Supary*, 1904 (Cal.) 190, I. C. 336, 295).

The result may be summarized as below:-

If the person wronged dies—

(1) His legal representative cannot bring a suit in respect of a personal injury, except when it causes a pecuniary loss to his estate (in which case a suit lies under Act XII of 1855), or when it causes death (in which case a suit lies under Act XIII of 1855).

(2) In respect of any other tort, his executor or administrator may sue within the ordinary period of limitation.

(3) Any other legal representative can sue only under Act XII, if the tort has caused pecuniary loss to the estate.

(4) A suit under Act XII must be brought within one year of his death, and cannot be brought unless the tort was committed within one year of his death.

(5) If the suit by an ordinary heir does not come within Act XII he should obtain letters of administration to be entitled to sue under probate and Administration Act or Succession Act.

No. 205—Suit under Act XIII of 1855 (Fatal Accidents Act)

1. The plaintiff No. 1 is the widow, and plaintiffs 2-4 are and were on December 21, 1923, the minor children of one Sukh Din deceased (*or*, the plaintiff is the widow of Sukh Din deceased and brings this suit for her own benefit and for the benefit of the minor children of the said Sukh Din on December 21, 1923).

2. The said Sukh Din was killed, his cart was smashed and his two bullocks were killed, by injuries caused by the negligence of the defendant's servants on December 21, 1923, at the Hindoria level crossing near Damoh station where the public cart-road fromto.....crosses the defendant's line of Railway.

3. The negligence consisted of the defendant's servants leaving the gates at the said level crossing open and thereby inviting the said Sukh Din to cross the line at a time when a special goods train was approaching Damoh side. In consequence the said Sukh Din who was proceeding to cross the line with his cart and bullocks was run over by the said train and was instantaneously killed, and his bullocks were also killed and his cart was smashed.

If the wrong-doer dies—

(1) If the tort was a personal injury, a suit can be brought against his legal representative only under Act XII, *i. e.* within two years of his death and only when the tort was committed within one year of his death.

(2) If it was any other tort, a suit can be brought against his executor or administrator within the ordinary period of limitation.

(3) If the wrong-doer has appropriated the property or proceeds or value of property of another, the latter can recover damages from his estate in the hands of legal representative.

Full facts showing how the suit is maintainable should therefore be alleged in every suit for tort by or against a legal representative.

Substitution : Act XII applies to suits *commenced* by or against a legal representative and does not permit a suit instituted during the lifetime of a person to be continued by or against his legal representative (*Ramchandra v. Rokmany*, 28 M. 487; *Har Das v. Ram Das*, 13 B. 677; *Krishna v. The Corporation of Calcutta*, 31 C. 406). The continuance of such a suit depends on whether the cause of action survives or not ac-

4. The said Sukh Din was earning Rs. 15 per month by plying his cart and was a healthy man of 32 years and was the sole support of the plaintiffs *or*, of the plaintiff and his minor children), and the plaintiffs (*or*, the plaintiff and his minor children) have suffered damage by his death, and by the death of his bullocks and damage to his cart.

Particulars of damage

Loss at Rs. 15 per mensem for 28 years, the expected period of the life of the said Sukh Din ..	Rs. 5,040
Value of the two bullocks	200
Value of the cart	80

Particulars of the persons for whose benefit the suit is brought

1. Musammat Baribahu, widow, aged 30.
2. Sita, son, aged 10.
3. Musammat Ganga, daughter, aged 7.
4. Musammat Jamna, daughter, aged 3.

The plaintiffs (*or*, the plaintiff) claim (s) Rs. 5,320, with interest from date of suit to that of payment.

cording to Succession Act or Probate and Administration or the principles of *Phillips v. Homfroy*.

Suits under Act XIII of 1855

If the death of a person is caused by wrongful act, a neglect or default of the defendant under such circumstances that, if the said act had only resulted in personal injury short of death, the deceased could have brought a suit for damages, the executor, administrator or representative of the deceased can bring a suit for damages under the Fatal Accidents Act XIII of 1855. Such a suit can be instituted only for the benefit of the wife, husband, parents (meaning father, mother, grandfather or grandmother) and child (meaning son, daughter, grandson, grand-daughter, step-son or step-daughter), and if the deceased has left no such relations, no suit can be brought. The suit may be brought by all the heirs named above or by any one of them, or by the executor or administrator of the deceased. Only one such suit is permissible, but a claim for injury to the estate of the deceased caused in the same transaction may be added (Sec. 2).

Particulars of the persons for whose benefit the suit is brought should be given in the plaint (Sec. 3), as also particulars of the wrongful act, neglect or default of the defendant, which caused the death, and also of the damages claimed. But for omission of the name of one beneficiary the suit cannot be dismissed at appellate stage *Jeet Kumari v. Chittagong E. & E. Supply Co.*, 1947 Cal. 195, 51 C. W.

LIBEL (v)

No. 206—Suit for libel

1. The defendant is the proprietor of the "Meerut Herald", an English weekly newspaper which has a large circulation in the Meerut division.

N. 419, 82 C. L. J. 68). Damages should be proportionate to the loss resulting from death to parties for whom the suit is brought (Sec. 1). Damages can be claimed under two heads; under S. 1, damages proportionate to the loss resulting from death to the claimants, and under S. 2 damages for pecuniary loss to the estate of the deceased resulting from the wrongful act which caused the death (*Jeet Kumari v. Chittagong E. & E. Supply Co.*, *ibid*). If the plaintiffs have received any compensation out of fine imposed by criminal court, the same should be taken into consideration in fixing the amount (*Nathuram v. Chand Kr.*, 106 I. C. 165 All.). For the prospective loss of income or other earnings, the court cannot give such a sum as, if invested, would produce the full amount of income which he would probably have earned, but should take into account the accidents of life and other matters and give the plaintiff what is considered under all the circumstances as a fair compensation for the loss (*Secretary of State v. Bari Babu*, A. I. R. 1926 (Nag.) 217). The possibility of the deceased's death, his age and earning capacities are factors all of which are to be taken into consideration in assessing the amount of damages (*Dhansingh v. Ganeshibai*, 101 I. C. 642 Lah.). Sympathetic damages or solatium for loss of companionship etc. are not relevant. What is to be considered is the loss of reasonably expected benefit (*Jeet Kumari v. Chittagong E. & E. Supply Co.* *ibid*). The principles on which the amount to be awarded as damages is to be assessed have been discussed in *Gobald Motor Service Ltd. v. R. M. K. Veluswami*, 1953 Mad. 981; *Dinbai Rivadia v. Farukh Mohdjan*, 1958 Bom. 218; *Vanguard Fire and Genl. Ins. Co. Ltd. v. Sarla devi*, 1959 Punj. 297; *Hiralal v. State*, 1961 Panj. 236; *Governor General in Council v. Bhanwari Devi*, 1961 All. 14; *State of Mysore v. Gowri Vithal Deshbhandari*, 1964 Mys. 113.

Limitation : There is a special period of limitation governing suits under Act XII of 1855. A suit by the legal representative of the deceased should be brought within one year (Art. 81) and a suit *against* him can be brought within two years, of the death of the deceased (Art. 83). In all suits brought under this Act, therefore, the date of death should be clearly alleged. But a suit to which Act XII does not apply, *i. e.* when the cause of action survives, is governed by the ordinary rule of limitation (*Chundermonee v. Bantomonee*, 1 W. R. 251). Limitation for suit under Act XIII of 1955 is two years (Art. 82).

Defence : Same as could be raised if the deceased had received personal injuries short of death and had brought a suit for damages.

(v) Libel consists of the publication by the defendant by means of printing, writing, picture, signs, etc., of any matter defamatory of the plaintiffs. **The following points must be alleged in the plaint :**

2. The plaintiff is employed as Executive Officer of the Bulandshahr Municipality, in the Meerut division, and has many friends and relations residing in the said division.

3. In the issue of the said paper of February 4, 1924, the defendant, falsely and maliciously, printed and published of the plaintiff, and of him by way of his profession, the

(1) The exact words which are said to be defamatory, or a description of the painting or signs claimed to be defamatory with their latent significance, (A. I. R. 1966 All. 377). (2) If the words are, with reference to the context, such as are capable of conveying a more serious imputation than they ordinarily carry such imputation may be alleged. If the words are plain and not defamatory in themselves, but were used by the defendant in a particular sense and have a latent meaning which is defamatory, such meaning of those words must be set out in the plaint. This explanation is technically called an "innuendo". But the words from which an "innuendo" is to be extracted must be fairly susceptible of the meaning sought to be given and where they are susceptible of several meanings, it is unreasonable to seize upon the bad meaning (*Hales v. Smiles*, 168 I. C. 853, 1937 (Rang.) 105). The meaning attributed by the plaintiff should be one which can be conveyed to reasonable men and words which bear their ordinary meaning should be shown to have a libellous tendency. It is not sufficient to show that they were understood by some persons in that sense (*Union Benefit Guarantee Co. v. Thakarlal*, 161 I. C. 769, 1963 (Bom.) 114). (3) That the defamatory statement was in writing or in printing or was conveyed in the form of painting or caricature. (4) That it referred to the plaintiff. (5) That it was published (with particulars of such publication, the names of persons whom and when and how it was published). (*Brijlal v. Mahant Lal Das*, 1940 (Cal.) 393; *Nannumal v. Ram Pd.*, 1926 (All.) 672, 96 I. C. 89). In case of newspapers it is not necessary to allege names of the persons who received and read the paper. Communication made in the ordinary course of business to a typist has been held not to amount to a publication (*Kishab Lal v. Pravat Chandra*, 1938 Cal. 667). (6) If the occasion of publication was one of a qualified privilege, e.g. when it was published in an official report, malice of the defendant must be alleged to show that he cannot take advantage of the privilege. (7) damages claimed. No special damages are necessary in such case, though if any have been suffered they can be claimed. But when in the case of libel on a company, the words complained of refer only to the personal character of its officers and do not reflect on the company in the way of its property, the company cannot succeed unless it proves special damage to it (*Union Benefit Guarantee Co.*, *ibid.*)

In England, the practice is to state that defamatory statement was made falsely and maliciously, though as the mere fact that the statement was defamatory raises a presumption in law that it was false and as the onus of proving that it was true lies on the defendant (*Belt v. Eaves*, 51 L. J. Q. B. 359; *Union Benefit Co.*, *ibid.*), it is submitted that

following words in an editorial article : “He has no educational qualifications, and is totally unfit for the post of an Executive Officer of a big Municipality like Bulandshahr. He was formely employed in the Municipal Board of Azamgarh and was dismissed by that Board for dishonest misappropriation of the Board’s money”.

4. By the said words the defendant meant, and was understood to mean, that the plaintiff was incompetent and

it is not necessary to allege falsity of the statement in the plaint (*Vide* O. VI, R. 13). Similarly, as malice is not an essential element to support a claim for libel (*Rahim Bakesh v. Bachchalal*, 51 A. 509, 27 A. L. J. 303, 115 I. C. 458, 1929 (All.) 214; *Union Benefit & Co., ibid*), unless the occasion of publication be one of qualified privilege it seems to be unnecessary to allege malice in every case. But, as it is not proper or safe to depart from established precedent, it is better to make these allegations also in every plaint for damages for libel or slander.

Limitation for such a suit is one year from the date of publication of the libel (Art. 75). The date of publication should therefore be alleged.

Parties : In case of newspapers, editors, printers and publishers are all liable but if suit against one is dismissed the others cannot be sued as the cause of action is indivisible (*Makhanlal v. Panchamlal*, 1934 (Nag.) 226, 152 I. C. 398). It has been held that where a libel is published in several newspapers, in assessing the quantum of damages, the amount recovered by the plaintiff in other actions for the same libel against other persons should be taken into account and the plaintiff should not in equity be allowed to exploit the libel to his profit several times over. (*Hales v. Smiles*, 1937 Rang. 105, 108 I. C. 853).

Defence : If there is no justification it is always wise to offer an apology, as to plead justification in such cases is to alienate the sympathy of the Judge and to run the risk of a decree for heavy damages. But apology tendered and accepted in criminal court is no defence to a civil suit (*Govind Charyalu v. Seshagni*, 1941 (Mad.) 860). Good faith also does not matter (*M. B. Meerut v. Bir Singh* A. I. R. 1965 All. 527). An unsuccessful plea of justification might deprive even a successful defendant of his costs (*Makhanlal v. Pancham, supra*). The following are the justifications of a libel, any one of which may be a complete defence, though more than one of such pleas may be taken. For instance, that the statement of facts are true and those of opinion constitute fair comment. Such a “rolled up” plea is held to be a plea of fair comment only (*Union Benefit Guarantee Co., ibid*).

(1) *Truth*, but if the real truth has been exaggerated, the libel will not be justified (*Clarkson v. Lawson*, 6 Bing. 266). If the charge made in the libel is specific, the defendant may simply plead its truth, but if it is one of general misconduct of the plaintiff, the defendant must, if he wants to justify it as true, give particulars of instances to prove the truth of the statement,

useless as an Executive Officer and further that he was a dishonest person who had committed a criminal offence or criminal offences while in the service of the Municipal Board of Azamgarh.

5. By reason of the premises, the plaintiff has been greatly injured in his credit and reputation and has been brought into public odium and contempt and has suffered much pain and humiliation.

The plaintiff claims Rs. 2,000 as damages.

No. 207—Suit for libel by innuendo published on an occasion of qualified privilege

1. The defendant is the Tahsildar of Tahsil Nakur, District Saharanpur, and the plaintiff is a zamindar of village Renkra in Tahsil Nakur.

(2) *Fair and bona fide comment* on matters of public interest. If the imputation is one of conduct amounting to a criminal offence, the defendant will have to prove it with the same conclusiveness as in a criminal prosecution, so that, if there is any doubt, the plaintiff will have the benefit of it (*Khair-ud-din v. Tara Singh*, 99 I. C. 300, 7 Lah. 491). A comment is not fair if it is not honest or relevant, or is not based on true facts and it must express an opinion and should not state a fact. (*Union Benefit Guarantee C. v. Thakorlal*, 161, I. C. 769, 1936 Bom. 114; *Raghunath v. Mukandiall*, 165 I. C. 892, 1936 (All.) 780).

(3) *Absolute privilege*, such as that of judicial proceedings including proceedings before any tribunal recognized by law such as a commission of inquiry (*Duraismami v. Laksbman*, 1933 (All.) 537) or state proceeding or parliamentary proceedings but not proceedings before administrative tribunals (*Purushottam Lal v. Prem Shanker* A. I. R. 1966 (All.) 377). A Judge or a Magistrate is absolutely privileged, even though he acts maliciously provided he does not knowingly act beyond his jurisdiction. A Vakil is also similarly privileged (*Jagat Mohan v. Kalipada*, 1 Pat. 371 1922 (Pat.) 85; *Sullivan v. Norton*, 10 M. 28); but it has been held in Bombay that advocates are not absolutely privileged and will be liable if malice is definitely proved by plaintiff (*Tulsidas v. Bilimoria*, 137 I. C. 275, 1932 (Bom.) 490, 34 Bom. L. R. 910). Statements made by parties or witnesses on oath or in complaints and the statement of an accused person are all privileged (*C. H. Crowdy v. L. O' Reilly*, 17 C. L. J. 105, 18 I. C. 737; *Narainmal v. Ram Prasad*, 1926 (All.) 627, so the statement made in first information report to the police (*Madhab Chandra v. Nirod*, 1939 (Cal.) 477, 43 C. W. N. 775). but the statement must be relevant to the inquiry (*Babu Prasad v. Mudomal*, 11 A. L. J. 193; *Girwar Singh v. Siraman Singh*, 32 C. 1060), and their relevancy should therefore be alleged in the defence. A police report under S. 202, Cr. P. C. is absol-

2. The collector called for a report from the defendant of all the persons who are habitual revenue defaulters in the defendant's said Tahsil.

3. The defendant, on September 4, 1924, submitted a written report to the Collector and therein falsely and maliciously wrote and published of the plaintiff the following words : "He is the best paymaster in my Tahsil and is a first class gentleman."

4. By the said words the defendant meant, and was understood to mean, that the plaintiff was the worst defaulter in his Tahsil and a thorough rogue.

5. By reason of the premises, the plaintiff has fallen considerably in the estimation of the District Officer and has suffered much in credit and reputation.

lutely privileged (*Veni Madho v. Wajid Ali*, 167 I. C. 433, 1937 (All.) 90). Statements made during investigation are however, not absolutely privileged (*Maroti Sadasbiv v. Godubai Naryanrav*, 1959 Bom. 433; *Haji Ahmad Hussain v. State*, 1960 A. L. J. 109; *Chotkan v. Stare*, 1960 A. L. J. 668). Allegations made in pleadings are absolutely privileged only if they are relevant to the case, action will lie if they are not pertinent or are made maliciously (*Dalpat v. Raja Amarpal* 6 O. L. J. 26, 49 I. C. 58; *Dhiro v. Gobinda*, 65 I. C. 204; *Nathji Mulesvar v. Lalbhai*, 14 B. 97; *B. Ganesbadutt v. Mangni Ram*, 11 Beng. L. R. 321 P. C.; *Hindustan Gilt & Co. v. Chilam Kurti*, 1943 (Mad.) 350; *Sumati Prasad v. Shiv Dutt*, 1946 A. L. J. 60).

Qualified privilege, such as information for public good, including information or report of a crime, character of servants, statements necessary to protect one's own interests, or those provoked by the plaintiff and fair reports of judicial or parliamentary proceedings or of a public meeting. In all these cases there is no defence if defendant is proved to have acted maliciously. If the defendant proves that he honestly believed that the plaintiff had committed the crime imputed to him, no action would lie (*Sajjad Husain v. Mulchand*, 1926 (Oudh) 18, 90 I. C. 951). The Allahabad High Court insists on proof of reasonable and probable cause also (*Majju v. Lachman*, 1924 (All.) 535, 46 A. 671, 22 A. L. J. 597 (F. B.) See Contra. 1962 Pat. 229). A slanderous statement made before a caste *panchayat* is not actionable in the absence of proof of actual malice (*Daulat Singh v. Prem Singh*, 1938 (All.) 447, 176 I. C. 797, 1938 A. L. J. 638).

Repetition of defamation is not justified, though it may mitigate the damages (*Finnerty v. Tipper*, 2 Camp. 72). It is no defence for the publisher of libel that he did not originate it but heard it from another or that it was a current rumour and the defendant *bona fide* believed it to be true (*Mohammad Nazir v. Emperor*, 26 A. L. J. 509; *Hales v. Smiles*

The plaintiff claims Rs. 5,000 as general damages.

MALICIOUS PROSECUTION (w)

No. 208—Suit for malicious prosecution

1. On January 4, 1925, the defendant filed a complaint before the Sub-divisional Magistrate of Roorkee, charging the plaintiff with having enticed away the defendant's wife.

2. A warrant was, on the said complaint, issued for the arrest of the plaintiff, and the plaintiff was arrested and kept in lock-up for a period of 32 days. He was tried on the said charge and was acquitted on February 6, 1925.

168 I. C. 853, 1937 (Rang.) 105; *Raghunath v. Mukandi Lal*, 1936 (All.) 780, 165 I. C. 892).

Previous conviction for the same defamation is no bar to a civil suit for damages nor can damages be reduced for that reason (*Venkayya V. Suraya*, 1940 (Mad.) 879, 1940 M. W. N. 892).

(w) Suit for malicious prosecution in Criminal Court lies but not for malicious institution of a Civil Suit (*Mohammad Amin v. Jogendra*, 1947. (P. C.) 367). See *Ram Pratap v. Narain Singh* A. I. R. 1965 All. 172 for malicious Civil proceedings action. In every suit for malicious prosecution these facts should be alleged (1) that the defendant initiated the proceedings against the plaintiff; (2) that the proceeding terminated in plaintiff's favour and the way in which they terminated (3) that the prosecution was malicious; (4) that it was started without any reasonable or probable cause; (5) general damages claimed, and particulars of any special damage claimed. The burden of proving all these facts is on the plaintiff, who must prove all of them (except No. 2) independently of the findings of the criminal court whose judgement can be used only for proving (2) *Shubarti v. Shamsuddin*, 110 I. C. 413, 16 A. L. J. 439, 50 A. 713, 1928 (All.) 337). In this respect this action differs from one for false imprisonment (*vide* note (o) *ante*). It has been held by the Allahabad High Court that a suit for malicious prosecution is maintainable even in case of institution of a proceeding under S. 13, Legal Practitioners' Act (*Babu Ram v. Nityanand*, 180 I. C. 563, 1939 (All.) 168). It has also been held that malicious initiation of proceeding under S. 144 or 145, Cr. P. C. and thereby procuring a wrong order from the court gives a cause of action for a suit for damages (*Chakrapani Naidu v. Venkataraju*, 169 I. C. 735, 1937 (Mad.) 647; *Narayana v. Peria*, 1939 M. W. N. 593, 1939 (Mad.) 783); also initiation of proceedings under S. 133, Cr. P. C. (*Jagdeo v. Dwarka*, 1948 (Pat.) 88, 26 Pat. 68 also initiation of proceedings under S. 107 Cr. P. C. 1955 Punj. 139).

In the absence of the complaint and the judgment of the Court which tried the case ending in the acquittal, it is difficult for any court of law

3. The defendant had brought the said charge against the plaintiff maliciously and without a reasonable or probable cause.

4. By reason of the premises, the plaintiff has suffered much physical and mental pain, and has been lowered in the estimation of his friends, and was prevented from attending to his business, and incurred expense in defending himself from the said charge.

Particulars of special damage

	Rs.
Fee paid to Mr. M. Banerji, pleader for defence ..	250
Fee paid to Mr. Ali Bux, mukhtar for defence ..	100
Travelling and diet expenses of 10 defence witnesses on two dates, January 30 and February 4, 1925 ..	50
Loss of business as a druggist for 32 days, at Rs. 3 per day	96
Total ..	496

to find that the prosecution was in fact malicious. (*Suryanand v. Harnath*, A. I. R. 1952 Ajmer 360).

It has been held by the Calcutta High Court that at least one of the following three sorts of damages must be shown to support an action for malicious prosecution :—

—(1) damage to a man's fame as where the matter whereof he is accused be scandalous.

—(2) damage to his person as when he is put in danger to lose his life, limb or liberty; and

—(3) damage to his property as where he is forced to spend money and necessary charges to acquit himself of the crime of which he was charged. If there was neither of these three sorts of damages, no action would lie (*Jatindra Mohan v. Corporation of Calcutta*, 1941 (Cal.) 3).

The question of liability for prosecution in cases set up by the police on information given or report made by the defendant depends on the facts of each case. If the defendant did no more than make a report and the plaintiff was prosecuted by the police after independent investigation in which the defendant has not taken any part, he is not liable (*Fayaz v. Sardar Khan*, 187 I. C. 789; *Raghubar Dayal v. Kalen*, 1940 (All.) 231, 188 I. C. 211) but if he took an active part, e.g., he named the witnesses before the police, asked the police to search the defendant's house, etc., he is liable, though he does not appear in court as a prosecutor (*Ganga Prasad v. Sardar Bhagat Singh*, 30 A. 525 (P. C.); *Tannumala v. Muddumura*, 8 M. L. J. 242; *Hari Charan v. Kailash*, 36 C. 278). But when the information of the defendant to the police was directed

The plaintiff claims—

- (1) Rs. 600 general damages for mental and bodily pain and loss of reputation.
- (2) Rs. 496 special damage.
- (3) Interest from date of suit to that of payment.

against the plaintiff, defendant was held liable even though the plaintiff was prosecuted after police investigation (*Ram Kishan v. Ram Narain*, 1934. (Pat.) 14). A person instigating a false prosecution with necessary knowledge and intention is also liable though he remained behind the scene. (*Issardas v. Assudamal*, 1940 (Sindh) 90).

Where it is found that a person had actually instigated the prosecution and had taken an active part in the prosecution and gave evidence for the prosecution, he will be liable as a joint tort-fesor along with the prosecutor, when the prosecution is found to be malicious (*Pragi Valji v. Verni Lal*, 6 D. I. R. (Sau.) 49).

A proceeding under S. 145, Cr. P. C. constitutes a prosecution which would sustain an action for damages for malicious prosecution. As costs are provided for in the Cr. P. C. in respect of such proceedings, where such costs are not awarded to a successful party, it is because he did not deserve them and therefore such a party cannot maintain an action for costs as damages for malicious prosecution. (*Akkullya Naidu v. Venkataswamy Naidu*, A. I. R. 1951 Mad. 659).

If a person places before a lawyer all the facts in his possession and acts in good faith on the opinion given to him by the lawyer, it is difficult to hold that he had no reasonable and probable cause for the step that he had taken (*Municipal Board, Agra v. Mangi Lal*, 1950 A. L. J. 754).

Where a person makes a complaint to the police against another knowing it to be false and misleads the police and makes them put up an innocent man for trial and himself gives evidence for the prosecution and even engages a pleader to conduct the prosecution, he cannot escape an action for malicious prosecution by pleading that it was the police who prosecuted and not he. (*Sama Nathu v. Kachra Narji*, A. I. R. 1952. (Sau.) 16).

Proceedings under security sections are also prosecutions (*Niaz Khan v. Jai Ram*, 17 A. L. J. 776, 41 A. 503, 50 I. C. 140). Action would not lie if the complaint is dismissed under S. 203, Criminal Procedure Code without the plaintiff having been summoned (*Golab v. Bhola*, 38 C. 880; *Sheikh Meeran v. Ratna*, 37 M. 181; *Subbag v. Nand Lal*, 8 Pat. 285, 118 I. C. 133, 1929 (Pat.) 271; *Deolal v. Remington Rang. Inc.*, 199 I. C. 755, 1940 (Nag.) 225; *Vattappa v. Mathu Karuppan*, 1941 (Mad.) 538; *Ali Mohammad v. Zahir*, 53 All. 771), but if the plaintiff was given notice and was present at inquiry under S. 202, action will lie (*Mohammad Amin v. Jogendra*, 1947 (P. C.) 367). If defendant only made a report to the police, who took the plaintiff in custody as defendant had suspected him and afterwards released him for want of proof defendant was held not liable (*Nagendra v. Basanta*, 57 C. 5, 1930 (Cal.) 392); *Dattatriya v. Hari Keshav*, 1949 (Bom.) 100. It has been held that the test of a prosecution is not whether the proceedings reached a stage where they

No. 209—Ditto, Statutory form*(Form No. 31, Appendix A, C. P. C.)*

1. On the day of 19 , the defendant obtained a warrant of arrest from (a Magistrate of the said city, *or as the case may be*) on a charge of , and the plaintiff was arrested thereon and imprisoned for days, *or* hours and gave bail in the sum of rupees to obtain his release.

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

could be termed a prosecution but whether damage resulted to the plaintiff (*Sanatan Sabu v. Kali Sabu* A. I. R. 1964 Orissa 187). Nominal damages were awarded where accused though not served appeared but later the order for summons was modified (*Zabarruddin v. Budhi* A. I. R. 1933 Pat. 292).

If the prosecution was false to the knowledge of the defendants, no further proof of want of reasonable and probable cause will be necessary (*Bansi v. Hukum Chand*, 1930 (All.) 216). Malice can also be inferred where the object of prosecution is to provide defence in a counter case (*ibid*). Any indirect or improper motive is malice in law (*Mahamud-ul-Hasan v. Md. Shibli*, 1934 (All.) 696), 151 I. C. 359). For burden of proof its discharge and shifting of burden *See* the case of *Vijai Nath v. Damodar Das and others* A. I. R. 1971 All. 109.

Formerly owing to a misunderstanding of the famous judgment of Bowen, J., in *Abrath v. N. E. Railway Co.*, (1883) 11 Q. B. D. 440, the majority of Indian High Courts had ruled that it was for the plaintiff to prove his innocence also, but the Privy Council held that this is not the law and it is not for the plaintiff to prove or allege falsity of the charge (*Balbhaddar Singh v. Badri Sah*, 24 A. L. J. 453; *Basdeo v. Shyama*, 1936 A. L. J. 803, 164 I. C. 184, 1936 (All.) 582; *Shubrati v. Shamsuddin*, 26 A. L. J. 439, 110 I. C. 413, 1928 (All.) 337; *Issardas v. Assuddomal*, 1940 (Sindh) 90; *Sab Manji v. Sab Chaturbhuj*, 1939 P. C. 225). Though it is not necessary to prove innocence as such, yet if the plaintiff wants to rely on his innocence as affording proof of other facts necessary for him to prove (*e. g.*, want of reasonable and probable cause) he should prove innocence independently of the judgment of criminal court (*Khaja Hussenuddin v. Kisan*, 25 N. L. R. 180, 1929 (Nag.) 260). The headnote of the case *An Singh v. Bhagat Singh*, 177 I. C. 986, 1938 All. 568, would show that it is necessary for the plaintiff to prove his innocence in certain cases where the case was of a nature that it must have been true or false

4. Many persons, whose names are unknown to the plaintiff hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him, *or*, in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E. F.*, *or* in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business and was injured in his credit and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

No. 21c—Like suit, when the case was sent up by the police

1. On January 4, 1957, the defendant made a report at the Kotwali Police Station, Varanasi, charging the plaintiff with having entered defendants house and having taken away the defendants valuable goods and documents.

to the defendant's knowledge, but a careful reading of the judgment would show that nothing more than what had been laid down in earlier cases has been decided in his case. The plaintiff has to prove want of probable and reasonable cause and if for the purpose of proving this it becomes necessary for him to prove his innocence he will have to prove it. This is all that has been decided, Proof of malice is not sufficient to prove want of reasonable and probable cause (*Madan Lal v. Lakshmi Marain*, 1938 P. W. N. 783) but from proof of want of reasonable and probable cause and of indirect motive or recklessness in instituting the complaint malice may be inferred (*Satyendra v. Abdul Manim*, I. L. R. (1938) 1 Xal. 202; *Abubaker v. Mangalal* 1940 (Mad.) 683, 1940 M. W. N. 305). For the distinction between malice and absence of reasonable and probable cause see *Dev Atma Nand v. Shambhu Lal* 1965 A. L. J. 317). Conviction by trial court subsequently set aside in appeal cannot afford evidence of reasonable and probable cause (*Manji Ram v. Chaturbhuj*, 183 I. C. 196, 1939 (P. C.) 225). The cases in which the accusations have been found to be false to the knowledge of the prosecutors stand on a different footing from those in which the accusations are based on information and belief. In those cases the prosecutors cannot be heard to say that there was no want of reasonable and probable cause *Ucho Singh v. Nageshar Pd.*, 1956 Pat. 285.

Some damages must be claimed for reputation and bodily and mental suffering, and special damages actually suffered, such as the cost of defence, loss of business, etc., must also be claimed. If cost was defrayed not by plaintiff but by another person, plaintiff cannot recover it (*Gyasiram v. Kishore*, 1930 (All.) 165). Special damages should be specifically proved, no damages can be allowed for the plaintiff's shop having remained closed without proof of consequent loss and on mere

2. On January 8, 1957, the police arrested and sent up the plaintiff to the sub-divisional Magistrate for trial and the said Magistrate remanded the plaintiff to custody, and the plaintiff remained in lock-up from January 8, 1957 to February 20, 1957, on which latter date the said Magistrate acquitted the plaintiff.

3. The real prosecutor of the plaintiff on the said charge was the defendant. The defendant misled the police by producing perjured witnesses before them during the investigation, and by falsely stating to the police that several articles belonging to the plaintiff and found at the time of search of the plaintiff's house belonged to the defendant. The defendant remained in court during the trial and assisted the public prosecutor by instructing him in opposing the plaintiff's application for bail and in the examination and cross-examination of the witnesses for the prosecution and the defence.

(4 and 5 and prayer) Same as 3 and 4 and prayer in precedent No. 208.

proof that plaintiff pays an income-tax (*ibid*). Plaintiff can get damages for loss of service during the pendency of the criminal case (*Raghunath v. Motiram*, 1933 (Rang.) 299). For distinction between suits for malicious prosecution and false imprisonment *see* note under "False imprisonment."

A suit for damages for malicious prosecution was decreed by the trial court with costs, but on appeal by the defendants the decree of the trial court was reversed and the suit was dismissed with costs. The plaintiff died thereafter and his legal representatives filed a second appeal. During the pendency of the second appeal the defendant died and his legal representatives were brought on record. On a preliminary objection raised by the respondents to the hearing of the second appeal, founded on the rule *actio personalis moritur cum persona*, held when the plaintiff respondent in the lower appellate court died after the decree of that court, there was no right to seek relief in further appeal on the part of his legal representatives. With the decree of the lower court in reversal of that of the trial court, the plaintiff lost in appeal what he had gained in the court of trial. It is as if he was thereafter to agitate the matter with a clean slate, so to say, if he should file a second appeal, and if before he could file it he died, his legal representatives could not file it after his death because with his death the cause of action personal to him died too. Further, when the defendant-respondent died during the pendency of the second appeal, the right to seek further relief did not survive against his

No. 211—Suit for malicious prosecution and false imprisonment

1. On October 20, 1927, the defendant wrongfully arrested the plaintiff at his house at Hardwar, kept him in *bavalat* during the night and in the morning sent him up in handcuffs to the court of the Sub-divisional Magistrate of Roorkee on a false charge of theft.

2. The plaintiff had to give bail and was released by order of the said Sub-divisional Magistrate late in the evening of October 21, 1927.

3. The said Magistrate tried the plaintiff on the said charge of theft and discharged him on November 5, 1927.

(4) and (5), as (3) and (4) in precedent No. 208.

The plaintiff claims—

(1) Rs. 400 as general damages for false imprisonment.

legal representatives. After wiping out of the trial court's decree by the lower appellate court's the position was that there was merely an outstanding claim in the second appeal undetermined in character on the part of legal representatives of the plaintiff against the respondents after whose death the claim cannot be pursued against the estate since it is only an unliquidated claim which has not been perfected by judgment at the time of the death of the defendant (*Jarulappa Konar v. Madanya Konar*, A. I. R. 1951 Mad. 733).

There is no presumption with respect to criminal proceedings that they were wrongly taken, if the proceedings fail in a court of law. It is, therefore, necessary for the plaintiff in a suit for malicious prosecution to prove not only that he has been declared innocent, but he must also show that there was no probable or reasonable cause for the complainant to have started proceedings in the case (*Ghulam Mohd. v. Mohamdoo*, A. I. R. 1953 J. & K. 20).

For the liability of the state for acts of its servants see *Md. Murad v. State of U. P.*, A. I. R. 1956 All. 75, *State of U. P. v. Kasturi Lal Raba Ram* 1960 A. L. J. 529 affirmed by S. C. A. I. R. 1965 S. C. 1039. *State of Bihar v. N. P. Jain* A. I. R. 1963 Part 290 and *State of Raj. v. Mst. Vidyawati* A. I. R. 1962 S. C. 833.

For wrongful imprisonment and liability of Magistrate see *State of U. P. v. Tulsi Ram & others* A. I. R. 1971 All. 162.

Limitation : One year from date of acquittal or termination of proceeding (Art. 74). If the defendant applies for revision from the order of discharge limitation will run from the dismissal of revision (*Madan Mohan v. Ram Sundar*, 125 I. C. 464, 1930 (All.) 326; *Bhagat Raj v. Garai*, 1937 A. W. R. 1113, 1937 A. L. J. 1281; *Contra Purshottam v. Ravji*, 1922 (Bom.) 209, 47 B. 28, 67 I. C. 754, 24 Bom. L. R. 507).

(2) Rs. 500 as general damages for malicious prosecution.

(3) Rs. 496 as special damages.

(4) Interest from date of suit to that of payment.

NEGLIGENCE (x)

No. 212—Suit for injuries caused to the plaintiff by negligent or rash driving

1. On February 20, 1924, the plaintiff was driving his tonga along the Chandni Chowk Road, Delhi, when the defendant's coachman, while acting in the course of his employment as such, so negligently drove the defendant's landau that they came into collision with the plaintiff's tonga.

Particulars of negligence

1. The plaintiff was driving from the Fort side to the Fatehpuri side and when his tonga reached the Dariba Kalan Junction, the defendant's landau came from the Dariba Kalan, being driven at a very rapid pace on the wrong side of the road, and suddenly turned sharply round the corner towards the Fort and so came into collision with the plaintiff's tonga.

2. The said collision caused severe injuries to the plaintiff's person and his horse, and damage to his tonga.

Forum . Suit must be instituted where plaintiff was prosecuted or where defendant resides; but it has been held that the cause of action partly arises also where the plaintiff receives summons of the criminal case (*Alexandra v. Indra*, 1933 (Cal.) 706).

Defence is usually truth of the charge. But it must be understood that it is not always easy to prove truth, though it may be easy to show that defendant had a reasonable and probable cause for instituting the prosecution. In such cases truth should not be pleaded, as an attempt to prove the truth may only result in heavier damages being awarded. Truth and existence of reasonable and probable cause may be pleaded in the alternative. If reasonable and probable cause is pleaded affirmatively particulars should be given. But if the plea is only a denial of the plaintiff's allegation of the absence of a reasonable and probable cause, no particulars will be necessary.

(x) In every claim based on the negligence of the defendant or his servant or agent, the plaintiff is bound to allege the following facts:—

(1) Facts showing that the defendant owed a duty to the plaintiff, as mere negligence, unless it amounts to a breach of any duty,

Particulars of injury

The plaintiff's left arm was broken and he received several bruises, was ill and suffering for two months and was unable to attend to his business as a medical practitioner. The front legs of the plaintiff's horse were broken for which it had to be in the veterinary hospital for three months, and has become permanently lame.

The off-shaft of the tonga was broken, as also the off-wheel, and the axle was bent.

Particulars of damages claimed

	Rs.
Fee to Dr. Sen for treatment of the plaintiff ..	500
Fee paid to Taj Din, Compounder	60
Chemist's bill	100
Loss of business as a medical practitioner for two months	1,000
Hospital expenses for the horse	90
Depreciation of value of the horse	200
Cost of repair to tonga paid to Messrs. Rodwell & Co., Delhi	100

The plaintiff claims Rs. 500 as general damages, and Rs. 2,050 as special damages, with interest from date of suit to that of payment.

will not afford a cause of action. The duty may be one arising out of contract, or one created by law, or one which all citizens owe to each other, *e. g.*, that no person shall run down another, etc. The facts on which such duty is founded must be stated. If the duty arises out of contract the contract must be pleaded, but if it is a legal or general duty which is presumed by law, it is not necessary to state its existence, and it would suffice to set out the facts and to state generally that the defendant acted negligently.

(2) **Facts showing that the duty was not performed.** Full particulars of the alleged negligence must be set out, but if negligence can be presumed from any act or conduct, the act or conduct must be set out, *e.g.*, when the injurious agency is under defendant's management and if an accident happens which ordinarily does not happen if those who have the management use proper care, defendant's negligence will be presumed. In such cases an allegation of the fact of defendant's management and the accident are sufficient.

No. 213—Suit for injuries caused to the plaintiff by negligent or rash driving

(Form No. 30, Appendix A, C. P. C.)

1. The plaintiff is a shoemaker, carrying on business at . The defendant is a merchant of .

2. On the day of 19 , the plaintiff was walking southward along Chowringhee, in the city of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in pain, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

[As Relief Claimed]

(3) That the alleged negligence was the proximate cause of injury or damage to the plaintiff. (*Governor-General of India in-Council v. Bibi Sahiman*, 1949 Lah. 388).

A suit would lie against Government for torts committed by its servants in the course of their employment in a business or commercial undertaking owned by the State. But the state is not liable for tortious acts of its servants in the course of employment or in exercise of statutory functions delegated to them which may be referable to exercise sovereign powers (*Data Ram Jain v. State of U. P.* A. I. R. 1965 S. C. 1039).

In an earlier case it was held that the fact that Sec. 132 of the Railways Act empowers a railway servant, under certain circumstances to arrest, without warrant or other written authority a passenger, does not afford immunity to the owner of the Railway undertaking from the conse-

No. 214—Suit against a railway company for negligence of its servant at a level crossing

1. The Defendant Company has a level crossing near the Budaun Railway station, where the public road from Budaun City to the Budaun civil lines is crossing the defendant's railway line.

2. On January 4, 1925, at about 6 A. M., the plaintiff's *syce* was taking the plaintiff's horse on the said road, and when he was passing over the said level crossing a goods train came from the Budaun station side and ran over the plaintiff's horse and killed it.

3. The said injury was caused to the said horse by the negligence of the defendant's servant at the level crossing in leaving the gates at the said crossing open and thereby inviting the plaintiff's *syce* to cross the line with the horse at a time when the said train was approaching.

4. The plaintiff has consequently suffered damage to the extent of Rs. 700, the value of the horse.

The plaintiff claims Rs. 700, with interest from the date of suit to that of payment.

No. 215—Suit for injuries received in a railway collision

1. On November 19, 1955, the plaintiff was a passenger by the 8 down train on the Northern Railway, owned by the defendant and had paid his fare.

quences of a tortious act on the part of its servant, simply because the relevant statute gives that servant authority to act in a particular way. In such a case, it would be no defence to say that the servant concerned was acting in the exercise of powers given to him under a statute. If, however, the act complained of was not incidental to a commercial undertaking but an act in the exercise of Governmental functions, it would be a defence if it can be shown that the person concerned was acting in exercise of powers under a particular statute. It would be otherwise if it could be shown that Government had expressly authorised or ratified the wrongful act purported to have been done in exercise of the authority or discretion conferred by the statute. (*Maharaja Bose v. Governor-General-in-Council*, A. I. R. 1952 Cal. 242).

Normally a master is liable for negligence of his servant if servant acts in the course of employment and principal is liable for negligence

2. After the said train has started from Muzaffarnagar, line clear was also given at the Mansurpur station to the 7 Up train by the negligence of the defendant's servants either at Mansurpur or at Muzaffarnagar, with the result that the 7 Up started from Mansurpur before the 8 down could reach Mansurpur, and both the trains coming from opposite directions collided with each other.

3. The plaintiff has sustained serious personal injuries as a result of the said collision caused by the said negligence of the defendant's servants.

Particulars of injuries

* * * * *

Particulars of damages claimed

					Rs.
Loss of business as a draper for 2 months ..				..	1,000
<i>Expenses of medical treatment</i>					
Fee paid to Dr Karamat Ali ..	..	..	..	..	500
Fee paid to Sahib Lal, Compounder ..	..	..	..	..	60
Bill of Banerji & Co., Chemists ..	..	..	..	..	75
Total ..				..	1,635

4. A notice of this claim as required by S. 80, C. P. C. was served on the General Manager of the Northern Railway by registered post on February 5, 1956.

of the agent acting within the scope of his authority (*Sita Ram Motilal v. Gautam* A. I. R. 1966 S. C. 1697).

It should be noted that in view of Sections 110 and 110 A to 110 F Motor Vehicles Act as amended in 1956 claims for compensation in respect of accidents involving death or a bodily injury to persons arising out of the use of Motor Vehicles lie to the claims tribunals appointed under Sec. 110 and the jurisdiction of civil courts with regard to such suits is barred. Against the award of the Tribunal an appeal lies to the High Court. Even before the Tribunal it will be desirable to observe the rules of pleading.

Limitation : Suits for compensation for defendant's negligence will be governed by Art. 113 (three years), (*Esso v. The Steamship "Savitri"*, 11 B. 133).

Defence : The defendant might show contributory negligence of the plaintiff himself, or that the damage and injury caused was the result

The plaintiff claims—

- (1) Rs. 500 as damages for bodily pain and suffering.
- (2) Rs. 1,300 as special damages.
- (3) Interest from date of suit to that of payment.

**No. 216—Injuries caused by negligence
on a railroad**

(*Form No. 29, Appendix A, C. P. C.*)

1. On the day of 19 , the defendants were common carriers of passengers by railway between.....and.....

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at (or near the station of or between the station of and), a collision occurred on the said railway caused by the negligence and unskilfulness of the defendant's servants whereby the plaintiff was much injured (having his leg broken, his head cut, etc., and state the special damages, if any), and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as salesman).

[*Relief claimed*]

of a pure accident, or of a wrongful act of third party for whose acts he is not responsible. He may deny that there was any damage to the plaintiff. In case of tort of a servant, the defendant (master) may plead that the act was not done in the course of employment nor on defendant's behalf, nor for his benefit.

The question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it. While in a case in which a clear line can be drawn between the two acts the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely knit together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not free from blame, might on the other hand invoke the prior negligence as being part of the cause on the principle which was laid down in "*Volute*", (1922) A. C. 129. A case of collision between ships, is much to be preferred, then a case of collision on land, in an attempt to classify

Or thus :—2. On that day the defendatnts by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendant's railway which the plaintiff was then lawfully crossing, that the said engine and train were driven against and struck the plaintiff, whereby, etc., (as in para.3).

NUISANCE (y)

No. 217—Suit for carrying on a noxious trade

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of the house to the west of defendant's open plot of land in Mohalla Chhipi, in the town of Aligarh.

acts in relation to one another with reference to time or with regard to the knowledge of one party at a particular moment of the negligence i.e. of the other party and his appreciation of the resultant danger and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable. Time and knowledge may often be decisive factors but it is for the jury or other tribunal of fact to decide whether in any particular case the existence of one of these factors results or does not result in the ascertainment of that clear line so as to make it a case of contribution or not. The existence of "subsequent" negligence will not alone enable that clear line to be found (*Marvin Sigurdson v. British Columbia Electric Railway Co., Ltd.*, P. C. Appeal No. 3 of 1952, dated 21-1952 (P. C.) (1953) Y. D. F. 1376).

In a suit for damages for torts where plaintiff alleges that the fall of his house was the consequence of collapse of the defendant's wall, it is for the plaintiff to prove his case, and he cannot take advantage of the defendant's inability to prove that his wall did not fall on the plaintiff's house (*State of V. P. v. Krishna*, A. I. R. 1953 V. P. 21).

Broadly speaking, tort may come under one of the three headings, a nuisance for which the defendant will be liable without proof of negligence, a tort where, the negligence being an ingredient, will be presumed against the defendant unless rebutted or one where the negligence of the defendant will have to be proved by the plaintiff.

Where after a few days rains defendant's wall and the plaintiff's out house near it came down at night when no body saw the actual process of falling, in a suit for damages filed by the plaintiff averring that his house was in a good condition and had been damaged by the fall of the defendant's wall the case was one of strict liability and not of presumed negligence. Strict liability of the defendant therefore had to be proved by the plaintiff (A. I. R. 1953 V. P. 21 *Supra*).

(y) There are two kinds of nuisance : (1) Public, and (2) Private. Public nuisance is an act affecting the public at large, and no individual can bring a suit in respect of it, unless he suffers any special injury over

2. Since January 1, 1925, the defendant has started a tannery on his said plot of land and has thereby wrongfully caused to spread from the pieces of skin, which he keeps on the said open plot of land for drying, such offensive smell all over the plaintiff's house that it has become both insani-tary and uninhabitable.

3. The plaintiff has, in consequence, abandoned his residence of the said house, and has taken another house on a rent of Rs. 30 per month, and no one is ready and willing to take the plaintiff's said house on rent on account of the said nuisance. The plaintiff has therefore suffered damage.

Particulars

Loss of rent, at Rs. 30 for 4 months .. Rs. 120

The plaintiff claims—

(1) A prohibitory injunction to restrain the defendant from spreading the offensive smell over the plaintiff's house.

(2) Rs. 120 as damages.

(3) Future damages at Rs. 30 per month upto the date the defendant obeys the said prohibitory order.

No. 218—Suit for carrying on a noxious manufacture

(Form No. 24, Appendix A, C. P. C.)

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called, that situate in.

and above that suffered by the rest of the public, and unless that injury is substantial and the direct cause of the nuisance. (See full discussion of this in note (k)). A suit in respect of such nuisance, either for declaration or injunction may, however, be instituted under Sec. 91 C. P. C. by any two or more persons with the permission of the Advocate-General and in that case no special injury has to be shown. The latter is a representative suit on behalf of the public, while the former suit can be brought by any person suffering special injury in his individual capacity. Such power may with the previous sanction of the state Government be, outside Presidency towns, exercised by Collectors or any other officer as the State Government may appoint in this behalf (S. 93). A suit by one party who wants to use a highway in a particular way against another who obstructs it in such use is not a suit relating

2. Ever since the day of 19 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the said lands.

3. Thereby the trees, hedge, herbage, and crops of the plaintiff growing on the said lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the said lands became unhealthy and some of them were poisoned and died.

4. The plaintiff was unable to graze the said lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep, and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the said lands as he otherwise would have had.

No. 219—Suit for discharging water on plaintiff's land

1. The plaintiff owns a piece of land bounded as follows, in Mohalla Khattrain, in the city of Meerut, and to the west of the said land is a house belonging to the defendant.

to a public nuisance and such a suit for declaration or injunction and be brought without proof of special damage (*Surendra v Dist. Board, Nadia*, 1942 (Cal.) 360). So a suit by only one section of the public (*e. g.*, Hindu community) is maintainable without sanction (*Governor-General v. Awadhoot*, 1946 (Nag.) 228)

Private nuisance is an act affecting a particular individual or individuals. If the individuals affected are limited in number, the nuisance is not public, whatever may be the number (*Ramghulam v. Ram-Khelawan*, 167 I. C. 798, 1937 (Pat. 481). It is also of two kinds: (1) that-producing personal discomfort, *e. g.*, noise, bad smell, etc., (2) that causing sensible injury to property, *e. g.*, discharging foul water on another's property, emitting smoke, destroying plants and trees, etc. Injury to personal comfort does not always amount to a nuisance, but the question generally depends on attendant circumstances. What may be

Boundaries of the plaintiff's land

* * * * *

2. In the first week of December, 1923, the defendant (i) opened a *mori* or drain in the eastern wall of his house through which he discharges the water of his latrine, (ii) constructed three water spouts in the said wall through which he discharges the rainwater of his roofs on the plaintiff's said land, and (iii) has opened a door in the said wall through which he passes over the plaintiff's said land. All these wrongful acts of the defendant are calculated to injure the plaintiff's property.

The plaintiff claims an injunction to restrain the defendant from discharging water through the *mori* and the three spouts on the plaintiff's said land, and from passing over the said land.

**No. 220—Representative Suit in respect of a
public nuisance**

1. In the first week of September, 1924, the defendant constructed a *Chabutra* in front of his residential house on a public road known as Maliwara Bazar in the town of Delhi.

2. The said construction has narrowed the said road at that particular point and has obstructed the passage of the public passing in carriages and tongas along the said road.

a nuisance at one place, *e. g.* in the country, may have to be tolerated in another place, *e. g.* a busy town. But such consideration would not apply when there is a sensible injury to property resulting from the nuisance. It is also necessary that the act complained of should be an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant and dainty modes and habits of living but according to plain, sober and simple notions obtaining among the people (*Thakurdas Menghraj v. Bhawanji*, 167 I. C. 145, 1937 (Sind.) 8). For principles to determine if nuisance is actionable see *Ram Lal v. Mustafabad Oil & Cotton Ginning Factory* A. I. R. 1968.Punj. 339 It is not merely on the ground of nuisance that restrictions can be imposed on the construction of buildings, and it has been held that an injunction to restrain the use of a building as mosque can be granted on proof that it would lead to communal disturbances (*Khaji Dodda v. Nanippa*, 1937 (Mad.) 348, 185 I. C. 554).

3. The defendant though requested by the plaintiffs by a registered letter, dated October 10, 1924, to remove the said *Chabutra* has failed and neglected to do so and, unless restrained from so doing, intends to maintain the said obstruction.

4. The plaintiffs have obtained the consent in writing of the Advocate-General to the institution of this suit.

The plaintiff claims—

(1) A declaration that the said road is a public road and the defendant is not entitled to obstruct the passage of the public along the same.

(2) An order to the defendant to remove the said *Chabutra*.

(3) An injunction to restrain the defendant from obstructing the passage of the public along the said road.

The injury caused by the nuisance must be real and substantial and mere temporary inconvenience from noise or dust caused by lawful exercise of a man's profession, and without negligence, is not actionable.

The actual occupier alone (*e. g.* a tenant) can bring a suit for nuisance of a temporary character, but if the injury is of a permanent character the landlord should bring the suit.

A suit for nuisance must be brought against the person actually committing it, but, if it is committed by a servant or agent for the master the latter should be sued. An owner who lets or sells property with a nuisance on it may be sued for the nuisance.

The nuisance and injury to the plaintiff should be alleged. If there are special circumstances which make the act a nuisance, though ordinarily it would not be so, they must be alleged. In case of public nuisance the special injury to the plaintiff must be alleged with sufficient details and particulars. If no particulars are given, general allegations will not do (*Rai Chand v. Mohin Chandra*, 91 I. C. 728, 1926 (Cal.) 594), but the Patna High Court took a more lenient view and held that this omission is not fatal (*Khurshed Husnain v. Secretary of State*, 169 I. C. 66, 1937 (Pat.) 302). There are clearly two modes of escape from the special restrictions of Sec. 91: (i) by proof of special damage and (ii) by proof of the invasion of the special rights of a limited class which will give an independent right of action on the principle of *Harrot v. Hirst*, (1869) 4 Ex. 43. (*Bibhuti Narayan v. Mahadev Asram*, 1940 Pat. 449; *Gajadhar Prasad Ganga Prasad Shukul v. Rishal Kumar Mohan Lal Baniya*, 1949 Nag. 319).

(N. B.—No claim for damages can be added to this suit under Sec. 91, C. P. C. If the plaintiff's have sustained any special and extraordinary damage by the nuisance, they can bring a separate suit without any permission from the Advocate-General).

No. 221—Ditto

(Form No. 37, Appendix A, C. P. C.)

1. The defendant has wrongly heaped up earth and stones on a public road, known as Street, at , so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained, the consent in writing of the Advocate-General to the institution of this suit.

The plaintiff claims—

(1) A declaration that the defendant is not entitled to obstruct the passage of the public along the said public road.

(2) An injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

A suit for removal of an obstruction on a village pathway is not covered by Section 91, C. P. C. as the path could by no means be described a public highway. (*Dalgovinda Mahatha v. Khatu Mahatha*, 1948 Pat. 183).

The plaintiff may claim damages or injunction: Damages will be allowed in all cases of nuisance to property where the injury is present and substantial, and in case of physical discomfort only when the act amounts to a nuisance. Injunction will be granted when the injury is continuous or defendant threatens to repeat the nuisance, or there is a probability that further nuisance will arise. Injunction will not be granted except in extreme cases, when the nuisance is temporary and occasional. A mandatory injunction will not be granted if a prohibitory injunction will serve the purpose, *e. g.*, in case of a latrine there should not be a prayer for its demolition, but for an injunction to restrain the defendant from using it as a latrine (*Rama Rao v. Martha Sequeira*, 42 M. 796, 37 M. L. J. 234, 52 I. C. 921). In the case of latrine which is a private nuisance, defendant can be ordered to build the latrine

**No. 222—Suit in respect of public nuisance
by an individual**

1. The plaintiff is a medical practitioner, and his medical hall is situate on the public road called the Mor Ganj Road in the town of Sharanpur.

2. The defendant is a grain merchant and has for the last six months been occupying the shop which adjoins the plaintiffs said medical hall on the North and opens on the said public road.

3. Ever since his occupation of the said shop, the defendant has been every day from 6 A. M. to 1 or 2 P. M., wrongfully exposing heaps of various kinds of grain on the said public road in front of the plaintiff's medical hall, as a result of which the plaintiff and his patients are put to great inconvenience when coming to, and going from, the said medical hall, by not being able to bring their carriages and cars right upto the medical hall door and having to leave the same in middle of the road and to walk over the grain scattered by the defendant in front of the said medical hall.

4. The defendant does not discontinue the said nuisance and threatens to continue and repeat it unless restrained by injunction.

The plaintiff claims—

(1) Rs. 50 as damages.

(2) A perpetual injunction restraining the defendant from keeping or scattering grain on the said public road in front of the plaintiff's medical hall.

upon latest scientific patterns *e. g.*, by putting up a spring door (*Krishna Chandra v. Gopal Chand*, 39 P. L. R. 664) and can be restrained in regard to its capacity being overtaxed (*Dattatraya v. Gopisa*, 101 I. C. 810 Nag.). So in case of defendant's opening a door on plaintiff's land but in defendant's own wall, the suit should not be for closing the door, but for an injunction to restrain the defendant from passing over the plaintiff's land. But where something is to be done on the property of the defendant to remove the nuisance, *e. g.*, cutting a tree or demolishing a wall, a mandatory injunction can be claimed.

Limitation : See note on Limitation in cases of wrongs to Easement.

**No. 223—Suit for polluting the water under
the plaintiff's land**

(*Form No. 23, Appendix A, C. P. C.*)

1. The plaintiff is, and at all the time hereinafter mentioned was possessed of certain land called and situate in , and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water, which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

No. 224—Suit for injunction restraining nuisance

(*Form No. 36, Appendix A, C. P. C.*)

1. Plaintiff is, and at all the times hereinafter mentioned was absolute owner of [the house No. street, Calcutta].

2. The defendant is, and at all the said times was the absolute owner of [a plot of ground in the same street].

Defence : The defendant may plead that the alleged act does not amount to a nuisance, or that the injury to the plaintiff from the same is not direct or substantial. He may plead that he has acquired, by prescription, a right to continue the alleged nuisance. When pleading this, he will have to give all the particulars necessary for such a claim. If he has altered the mode of enjoyment of the alleged easement, causing addition to the burden on the servient heritage, he may plead any of the three grounds mentioned in Sec. 43, Easements Act, on which he can claim that the easement still survives. Change in the position of windows is change in the easement of light and air and cannot be permitted (*Bai Hariganga v. Tricamlal*, 26 B. 374). Change in the position of parnalas (or water spouts) may amount to an addition of the burden by increasing the force of the water and will extinguish the old easement.

3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

4. In consequence, the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

**No. 225—Suit for injunction against the diversion
of a water course**

(Form No. 38, Appendix A, C. P. C.)

[As in form No. 27 of C. P. C., i. e., No. 180 ante]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

It is a good defence to an action for an act which is a nuisance that it was directed or authorized to be done by law, unless the statutory powers were used negligently or in bad faith (*East Freemantle v. Annois*, (1902) A. C. 213; *Nirmal Chandra v. Municipal Com. of Patna*, 40 C. W. N. 1353, 1936 (Cal.) 707). But, if that act authorized or directed by law is not a nuisance in itself but it becomes a nuisance if done negligently and the defendant has done it negligently, the law would be no defence (*Crane v. South Suburban Gas Co.*, (1916) 1 K. B. 33). No length of time can justify a public nuisance.

In case of a private nuisance affecting the personal comfort of a person, length of time would be no defence, if the plaintiff had no power to stop the nuisance (*Sturges v. Bridgman*, 11 Ch. D. 852). Laches or acquiescence may sometimes be a good defence, particularly in a suit for an injunction, for instance, to a suit for removal of a balcony overhanging land jointly owned by the parties. It is no defence that the plaintiff himself came to the nuisance, or that the act of causing nuisance is beneficial to the public (*Shelfer v. City of London E. L. Co.*, 1 Ch. 287), or the place where the nuisance is created is the only place suitable for the purpose (*St. Helen's Smelting Co. v. Tipping*, 11 L. C. 642), or that the defendant is merely making a reasonable use of his property (*Reinhardt v. Mevasti*, 42 Ch. D. 658) or that reasonable care and skill are taken to prevent the nuisance (*Rapier v. London Tramways Co.*, 2 Ch. D. 588).

No. 226—Suit for injunction against digging plaintiff's land (z)

1. The plaintiff is the owner of fields Nos. 572, 573 and 574 in village Kailashpur, Tahsil Jagadhari, District Ambala, the total area of which is 25 *Kanals*.

2. On May 1, 1925, the defendant began wrongfully to dig, and is still digging, earth from the said plot for the purposes of his brick-kiln close by. He threatens and intends to continue and repeat the act, unless restrained from so doing.

3. The said fields could not, in consequence, be let to anybody for cultivation and the plaintiff has suffered damage.

Particulars

	Rs.
Expenses to be incurred in re-filling the pits ..	300
Loss of one year's rent	250

The plaintiff claims—

(1) Rs. 550, as damages.

(2) An injunction to restrain the defendant from digging any earth from the said fields.

WRONGFUL SALE (aa)

No. 227—Suit for damages for wrongful sale of plaintiff's goods

1. In execution of his decree No. 509 of 1924, passed by this court against one Shamlal, the defendant attached, on July 10, 1924, and wrongfully sold, on September 20, 1924, the following goods of the plaintiff :—

(z) In such cases, it will be a mistake to ask for a mandatory injunction to fill up the pits. No such order can be granted in case of a nuisance which the defendant commits on the plaintiff's property. The plaintiff can remove it and recover cost of doing so as damages.

(aa) See Note (d) about suits for damages for wrongful attachment. If the plaintiff cannot obtain release of the goods and they are wrongfully sold, his remedy is to sue for damages for the wrongful sale.

(1) Four cows worth Rs. 150; (2) Two she-buffaloes worth Rs. 160; (3) One mare worth Rs. 200; and (4) wheat worth Rs. 400.

2. The plaintiff has suffered damage thereby.

Particulars of damages

	Rs.
Value of the property at the date of attachment as per details given above.	910

The plaintiff claims Rs. 910, with interest from date of suit to that of payment.

SEDUCTION (bb)

No. 228—Suit for seduction of wife

1. Smt. Ramo was, on November 15, 1920, and still is, the wife of the plaintiff, and the defendant on all material dates well knew this fact.

2. On November 15, 1914, the defendant wrongfully enticed and procured Smt. Ramo unlawfully against the will of the plaintiff, to depart and remain absent from the house and society of the plaintiff.

(Or, on the said day, the said Smt. Ramo, without any provocation or other cause and without the consent of the plaintiff and against his will, and without his knowledge, left the house of the plaintiff).

The damage is usually the value of the goods. The price fetched at the auction sale is not necessarily the measure of damages, as that may be very low, but the plaintiff can claim what the property was actually worth, as also any other damages which he might have suffered by its seizure but, as the money is claimed as damages, he cannot get any interest on it from the date of seizure.

Limitation is only one year (under Art. 80) and that reckoned from the date of attachment. This should be carefully noted.

(bb) A father can maintain a suit for damages for the seduction of his daughter. The basis of such a suit is the plaintiff's loss of service of the daughter. If the daughter was living with the father, and the father had a right to exact service from her, that is sufficient; and actual service rendered by her need not be alleged. Similarly, a suit may be brought by a husband against anyone who entices away his wife, for loss of her affection, companionship and aid. The motives with which the defendant took away the wife or persuaded her to leave the

3. The defendant wrongfully and against the will of the plaintiff, on the said day, received and has ever since harboured and detained the said Smt. Ramo at his house and refuses to deliver her to the plaintiff.

4. The plaintiff has thereby lost the society and services of his said wife.

The plaintiff claims Rs. 1,000, as general damages, with interest from date of suit to that of payment.

protection of her husband are immaterial and need not be alleged in the plaint, unless they are such as will aggravate the amount of damages. Even a father who persuades his daughter to leave her husband is liable for damages (*Md. Ibrahim v. Gulam Ahmad*, 1 B. H. C. 236). The plaint should only show that the woman is the plaintiff's wife, that the defendant enticed her away, and that he, at the time, knew that she was the plaintiff's wife. (*Sobha Ram v. Tika Ram*, 1936 (All.) 454). Even if the defendant does not entice her away, but she leaves the husband's house of her own accord, and the defendant harbours her knowing that she has left her husband without any just cause, he is liable for damages. But if she leaves her husband on account of his cruelty or misconduct, and the defendant gives her protection from motives of humanity, he is not liable (*Philip v. Squire*, 1 Peake 114). A suit for damages for adultery may similarly be brought, as adultery is an actionable wrong against the marital right of the husband. In England the jurisdiction to grant damages for adultery has since 1857 been given to Divorce Courts. In India also under the Divorce Act, 1869 damages can be claimed by an application under Sec. 34 and not by a regular suit if the plaintiff is a Christian. Regular suit is necessary if he is a non-Christian.

The damages in all such cases are more or less arbitrary, as there is no criterion for actually measuring the loss suffered by the plaintiff. But the amount should ordinarily be exemplary (*Irvin v. Dearwan*, 11 East 23), and the disgrace and dishonour suffered by the plaintiff, his feelings and social position of the parties must all be taken into consideration.

Limitation : One year from the time when loss of service by seduction occurs (Art. 77) in case of daughter and servant and 3 years in case of wife (Art. 113). (*Sobha Ram v. Tika Ram*, 1936 (All.) 454. Case under the Limitation Act of 1908).

Defence : In cases of seduction, there is very little defence except denial of the seduction, or of the plaintiff's marriage or continuance of marriage with the woman seduced. The defendant may plead that the woman had left the plaintiff's protection of her own accord owing to the cruelty or misconduct of the plaintiff, and the defendant had only given her protection from motives of humanity. But otherwise the consent of the woman to seduction or adultery is no defence.

SLANDER (cc)**No. 229—Suit for slander**

1. On February 8, 1925 the defendant falsely and maliciously spoke and published of the plaintiff, and of him by way of his profession as a medical man, to Sri Ram Prasad of Meerut Sri Biharilal of Hapur, Sri Ram Narain of Ghaziabad and several other patients of the plaintiff (whose names are unknown to the plaintiff), the following words :—"Dr. Ghosh may be a capable physician but his moral character is bad and he is not a fit person to be introduced into respectable families."

(If any special injury is alleged it may be alleged as follows :—

2. The plaintiff was, in consequence, much injured in his reputation, and the three patients named above, and several other patients whose names are unknown to the plaintiff, have ceased to call the plaintiff for consultation and treatment, and the plaintiff has thus suffered loss in his professional business as a medical practitioner, as well as injury to his general character).

The plaintiff claims Rs. 2,000 as damages, with interest from date of suit to that of payment.

No. 230—The like, another form

1. The plaintiff is a road contractor and the defendant is a member of the Buildings and Roads Sub-committee of the Corporation of Allahabad.

2. The plaintiff was engaged by the said Corporation of Allahabad as a contractor to make certain roads within the limits of the said Corporation.

(cc) Slander is an oral libel and all facts necessary to be alleged in a suit for libel must be alleged in a suit for slander except that the defamation was in writing. Any special damages suffered must be alleged as that would, in any case, affect the amount of damages. In England, slander is not actionable without proof of special damage except when it imputes a criminal offence, a contagious disease, or unchastity or when any imputation injuriously affecting the plaintiff in

3. On March 4, 1960, at a meeting of the said Corporation the defendant falsely and maliciously spoke and published of the plaintiff, and of him in the way of his business as a road contractor, the following words :

“Ram Chandra contractor has broken his contract in many important particulars, and, from the somewhat cursory way in which I have examined his work, I can say it has been very badly done and he should not be paid a single pie without his work being thoroughly examined by the Corporation Engineer”.

4. The said words were spoken to the following members of the said Corporation.

.....(names).

office, profession, trade or business is made. But the restriction is not recognised in India, and any defamatory statement which is calculated to cause pain to the person defamed is actionable, provided it is not a mere hasty expression spoken in anger to which no hearer would attribute any set purpose to defame (*Kashi Ram v. Bhadu*, 17 B. H. C. 17; *Parvathi v. Mannar*, 8 M. 175; *Sangar Ram v. Babu Ram*, 1 A. L. J. 102; *Gajadin v. Mahabir*, 95 I. C. 90. 3 O. W. N. 443, 1926 (Oudh) 363). It is sufficient if the words used excited against the plaintiff feeling of contempt and ridicule (*Suraj Narain v. Sita Ram*, 183 I. C. 236, 1939 (All.) 461). But if no substantial injury is caused to the plaintiff, the damages that he can get will only be nominal. The Calcutta H. C. has, however, held that mere use of abuse and insulting language is not actionable without any special damage (*Girishchandra v. Jatadhari*, 26 C. 653) e. g., calling a man outcaste (*Girdharilal v. Punjab Singh*, 146 I. C. 1908, 1933 (Lah.) 72). A suit for slander of a Parsi lady does not lie on the original side of Bombay H. C. without proof of special damage (*Hirabhai v. Din Shah*, 95 I. C. 556, 28 Bom. L. R. 391, 1926 (Bom.) 302). *Contia Narayan v. Khammama*, 1932 (Mad.) 445, 1932 M. W. N. 463, 62 M. L. J. 608, 55 M. 727 (case of Hindu lady).

It must be remembered that every insulting statement will not be actionable, unless it was defamatory also, e. g., to call a European “Native” may be insulting but is not defamatory (*Christensen v. Caster*, 41 I. C. 696 Low. Bur.). Also words of abuse used in the heat of a quarrel are not actionable as the person using them cannot be said to defame the person whom he abuses (*Srigineedi v. Tirumili*, 52 M. L. J. 87, (1927) M. W. N. 83, 100 I. C. 90).

Limitation : One year from the date when the words are spoken, or, where slander is not actionable without proof of any special damage, when such damage results (Art. 76).

5. The defendant meant, and was understood to mean thereby, that the plaintiff was dishonest and fraudulent person who claimed money to which he was not entitled and that the plaintiff was not fit to be trusted or employed to carry out any public work.

6. In consequence, the plaintiff was injured in his credit and reputation in his professional business as contractor, and the Antarim Zila Parishad of Allahabad and that of Mirzapur, which had formerly been employing the plaintiff as such, ceased to do so.

The plaintiff claims Rs. 5,000 as general damages, with interest from date of suit to that of payment.

TRADE MARK (dd)

No. 231 (a)—Suit for infringement of a trade mark

1. The plaintiffs have for the last 25 years manufactured and sold under the names of "Sanatogen" and "For-

Defence : Same as in case of libel, except that where special damages are necessary to sustain the action, according to Allahabad H. C. view the same may be denied, or may be alleged to be not the direct result of the slander.

(dd) In India prior to the Trade Marks Act (Act V of 1940) there was no system of registration of trade marks as in England and no right was therefore acquired by registration and the trader or manufacturer had to depend on common law right (*British A. T. Co. v. Mahbub*, 15 C. W. N. 280; *Jamal v. Abdul Karim*, 151 I. C. 869, 1934 (Mad.) 211, 66 M. L. J. 440, 57 M. 600). Now the Trade and Merchandise Marks Act (XLIII of 1958) has repealed and replaced the Act of 1940. The Act of 1958 repeals the Merchandise Marks Act 1889 also. Registration of declaration of ownership under the Indian Registration Act is not registration of trade mark under the Trade Marks Act (*Lokinath v. Aswini Kumar*, 1938 (Cal.) 216, 175 I. C. 134, 42 C. W. N. 1121). Under the Act of 1958 owners of trade marks have to get them registered, because under S. 27 of the Act no person is entitled to institute any proceedings to prevent or to recover damages for the infringement of an unregistered trade mark. The registration confers on the registered proprietor of the trade mark certain rights including the exclusive right to use the trade mark in relation to the goods in respect of which the trade mark is registered. The plaintiff must prove that he is a registered proprietor of the trade mark. Infringement has further to be shown. Infringement has been defined in S. 29 of the Act of 1958 as use

mamint" certain chemical compounds for use in medicine and pharmacy, and within a short time the said compounds sold under the names of Sanatogen and Formamint acquired a very high reputation throughout India and the sales thereof were large and profitable and the names of Sanatogen and Formamint had come to mean chemical compounds of the plaintiffs' manufacture.

in the course of trade of a mark which is identical with or deceptively similar to the trade mark in relation to any goods in respect of which the trade mark is registered and in such manner as render the use of the mark likely to be taken as use of the trade mark. In a recent case *National Bell Co. & Gupta Industrial Corporation v. Metal Goods Mfg. Co.* A. I. R. 1971 S. C. 898 the S. C. considered the various provision of Trade & Merchandise Act 1958 and explained the expressions "Aggrieved person" "A Distinctive Trade Mark" & Infringement and Commencement of Proceedings & made certain important observations, which may be looked into as also the cases referred to therein. *Fraudulent* intention is not necessary (*Bundi Portland Co. v. Abdul Hussein*, 1936 (Bom.) 418). The mere fact that if looked at properly the defendant's trade mark was not the same as the plaintiff's is immaterial if the whole get-up of the one was like that of the other (*Juggimal v. Swadeshi Mills*, 56 I. A. 182, 27 A. L. J. 1, 33 C. W. N. 242, 31 Bom. L. R. 285, 114 I. C. 30, 1929 (P. C.) 11; *Ibrahim v. Abdulla*, 65 M. L. J. 617). The test of comparison by placing the two marks side by side is not a sound one but what has to be seen is the element of similarity which may cause deception. (*Thomas Bear Co. v. Prayag Narain*, 1940 (P. C.) 86, 187 I. C. 658). It is not necessary to prove actual deception (*National Carbon & Co. v. Sei Sen & Co.*, 1938 (Rang.) 99, 176 I. C. 597; *Firm Bhagwandas Rangilal v. Watkins Mayor & Co.*, 1947 Lah. 289), but the court should be satisfied that an unscrupulous retailer could be able to foist the defendant's goods upon an ignorant purchaser who trusts to his memory and has no opportunity of comparison (*Steel Bros. v. Ahmad Ibrahim*, 99 I. C. 723, 4 R. 401; *Swadeshi Match Co. v. Adamjee*, 99 I. C. 227, 4 R. 381; *Herbert Whitworth Ltd. v. Jammadas*, 110 I. C. 312, 1928 (Bom.) 227, 30 Bom. L. R. 514, 52 B. 228; *Abdul Karim v. Abdul Karim*, 1931 (Mad.) 461, 1931 M. W. N. 311, 132 I. C. 650). Mere possibility of deception is, however, not sufficient; there must be a reasonable probability (*Barlow v. Gobind Ram*, 24 C. 364; *Nem Chand v. Wallace*, 34 C. 495; *Karim v. Abdul Aziz*, P. L. R. 127 of 1909; *Van Wulffing v. Jiwan Das*, 1926 (Bom.) 200, 28 Bom. L. R. 243, 93 I. C. 857). The test is not whether the ignorant, thoughtless or incautious purchaser is likely to be misled but court has to consider an average purchaser buying with ordinary caution. (*The National Sewing Thread Co. v. Messars James Chadwick & Bros.*, 1948 Mad. 481, 1948-1 M. L. J. 303, 1948 M. W. N. 276). Therefore mere phonetic similarity cannot be considered such as between "Cocogem" and "Kotogem" (*Modi Mills v. Tata Oil Mills*, 1943 (Lah.) 196). Absence of a specific instance of confusion or deception, though not

2. At the end of October, 1914, the defendants imported into Bombay two consignments of some substance under the names of Sanatogen and Formamint and have since then been selling the same at a much lower rate than the plaintiffs' goods.

3. The general make up, marking, and appearance of the defendants' packages, apart from the use of the names of Santogen and Formamint, has been made to resemble

conclusive is a material consideration (*Ibid*) and a strong case must be made out to justify the conclusion that confusion will result (*Imperial Tobacco Co. v. Mullaji*, 168 I. C. 573, 1937 (Nag.) 158), but the Bombay High Court has held that where there is a deliberate imitation of trade-mark the onus shifts on to the imitator to prove that he is not liable (*Gujrat Ginning Co. v. Swadeshi Mills*, 181 I. C. 17, 1939 (Bom.) 118). In the mere use of trade mark there is no monopoly and so a manufacturer of cigarettes under a mark of a particular device cannot object to the use of the identical mark on hats or soaps as the use cannot cause any deception (*Francis Day v. T. C. F. Corporation*, 1940 (P. C.) 55). If claim is based on the ground of fraud, fraudulent intention should also be expressly pleaded (*Adamjee v. Swadeshi Match Factory*, 110 I. C. 305, 1928 (Rang.) 210, 6 R. 221). The plaintiff can claim damages suffered by him and, if none have been suffered, nominal damages. (*Thomas v. Prayag*, 4 A. W. R. 10280 ; *Ram Kumar v. R. J. Wood*, 1941 (Lah.) 262, 195 I. C. 831; *Firm Kooverji v. Firm Adam Haji*, 1944 (Sindh) 21), as he can bring a suit without waiting for the purchase of defendant's goods as his (*The National Sewing Thread Co. Case ibid*), or he may ask for account of profits made by the defendant and recovery of that amount, in addition to injunction. But if the infringement is innocent no account can be ordered unless the infringement continues after notice of owner's right, though injunction can be granted (*Calico Printers Association v. Ahmad A. Bros.*, 182 I. C. 577, 1939 (Bom.) 198). For method of assessment of damages, see *Hormus v. Ardesbar*, 6 I. C. 571 and *Sallay v. Sulaiman*, 10 R. 85, 137 I. C. 202, 1932 (Rang.) 56; *Kamlapat v. Bhukabhai*, 188 I. C. 462 Bho.). Exemplary or penal damages cannot be awarded (*Upper Sindh Cigarette Manufacturing Co. v. Peninsular Tobacco Co.*, 1941 (Lah.) 293, 196 I. C. 19). Where the plaintiff's mark is itself fraudulent he is not entitled to sue (*Doulat Ram v. Veramal*, 1938 (Lah.) 803).

A suit for declaration that plaintiff did not infringe defendant's trade mark does not lie (*Mohammad Abdul Kadar v. Finlay*, 6 R. 291, 1928 (Rang.) 256, 111 I. C. 136).

Where a particular name has become associated with a goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which are so similar to that of the plaintiff that the purchaser might infer a common origin (*Dhan Lakshmi Weaving Works v. Mahomed Abdul Aziz*, (1941) 2 M. L. J. 435, 1941 P. W. N. 1018

closely the plaintiffs' packages in order to pass off the defendants' goods as the plaintiffs' goods.

Particulars of packages of plaintiffs' goods

* * * * *

Particulars of packages of defendants' goods

* * * * *

4. The object of the defendants in importing and selling the said goods is to deceive the public and lead them to believe that in purchasing the inferior compounds offered for sale they were buying the genuine articles of the plaintiff's manufacture.

In order to justify the issue of an injunction in an action for infringement of a trade mark or a trade description, it is not at all necessary that there should be an intention to deceive. A man has a right of property in the good will of his business which he has either built up or acquired, and if another interferes with it by "passing off" his own goods among the public as the former's then that person has a remedy. He can go to Court and obtain an injunction restraining the latter from such act even if that latter's action be entirely innocent and done in ignorance of any interference with the former's rights. The proper test to apply in such cases is not whether a person, after careful and intelligent examination or study of the mark on the goods, and after putting them together, is not likely to be misled, but whether by the general impression produced, or "the main idea left on the mind" of looking at the article there is probability of the similarity causing deception. Each case must depend upon the degree or amount of resemblance. If an ignorant or unwary purchaser is likely to be misled by the name or description or appearance infringing article mark or name, that would be a sufficient ground of action and would justify the issue of an injunction (*Manglore Ganesh Beedi Works v. Free India Works*, A. I. R. 1951 Mys. 29).

The question of resemblance between two trade marks and the likelihood of deception are to be considered by reference not only to the whole mark but also to the distinguishing or essential feature, if any, of a trade mark. There may be cases where dissimilarity in the object represented may be the dividing factor. If for instance a particular class of goods are sold by several dealers, all under different kinds of "Eagle" Trade marks, e. g., then the purchaser is expected to know the difference between one trade mark and another, knowing as he does that more than one person sells goods under the same appellation. But when only a single proprietor sells a particular class of goods under the "Eagle" brand and his goods are known as Eagle or Eagley then the position is different, any attempt to sell goods under a trade-mark which fixes in the mind of the purchaser the association of an eagle would not be justified. (*James Chadwick & Bros. Ltd. v. National Sewing Thread Co. Ltd.*, A. I. R. 1951 (Bom.) 147).

5. Since the import of the defendants' goods, the sale of the plaintiffs' goods has fallen considerably and the plaintiffs have suffered damage.

The plaintiffs claim—

(1) An injunction restraining the defendants from passing off, or attempting to pass off, and from enabling others to pass off, chemical compounds not of the plaintiffs' manufacture as the goods of the plaintiffs manufacture by use of the names Sanatogen or Formamint, or by use of packages of similar make and appearance as those used by the plaintiffs for his goods.

There is a real distinction between an infringement action and a passing off action. The main question in a passing off case is whether goods have been passed off as these of another. In substance it is an action for deceit. Action for infringement is a statutory remedy conferred on the registered proprietor for the indication of his exclusive right to the use of the trade mark in relation to those goods. The essential features of both actions might coincide where the passing off is merely by use of colourable imitation of the trademark. But while mere imitation of registered trade mark is sufficient for an action for infringement it may be a good defence in an action for passing off that notwithstanding appropriation of certain essential features of the registered trade-mark the goods are sufficiently distinguished from those of the plaintiff (*Pandit Durgadutt v. Navratna Pharmaceutical Laboratories* A. I. R. 1965 S. C. 980).

The onus in a passing off action rests on the plaintiff to prove whether there is likelihood of defendant's goods being passed off as the goods of the plaintiff. The considerations relevant in a passing off action are somewhat different than they are on an application made by registration of a mark under the Trade-Marks act and that being so the decision of Court in a passing off action cannot be considered as relevant on the question that the Registrar has to decide under the provisions of S. 8. (*The National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd.*, A. I. R. 1953 S. C. 357, (1953) S. C. J. 509).

All proceedings in connection with the registration of trade marks are to be taken before the Registrar of Trade Marks. The powers and duties of the Registrar in that connection and the procedure to be followed are laid down in the Act. Under S. 105 of the Act, suits for infringement of a registered trade mark or relating to any right in such mark and passing off actions are to be instituted in the District Court having jurisdiction. In such suits the reliefs that can be claimed included injunction and at the option of the plaintiff either damages or an account of the profits together with or without any order for the delivery up of the infringing labels and marks for destruction or erasure. In suits

(2) That an account be taken from the defendants of the profits they have made by sale of their said goods from the date of their import in Bombay.

(3) Payment as damages of the amount of profits so found to have been made by the defendants.

relating to infringements, damages other than nominal damages or an account of profits cannot be allowed where (a) in a suit for infringement of a trade mark, the infringement complained of is in relation to a certification trade mark or (b) where in a suit for infringement the defendant satisfies the court (1) that at the time he commenced to use the trade mark complained of he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was on the register or that the plaintiff was a registered user using by way of permitted use and (ii) that when he became aware of the existence and nature of the plaintiff's right in the trade mark, he forthwith ceased to use the trade mark in relation to goods in respect of which it was registered.

In passing off actions the relief of damages other than nominal damages on account of profits cannot be allowed if the defendant satisfied the court that at the time he commenced to use the trade mark complained of, he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was in use and further that when he became aware of the existence and nature of the plaintiff's trade mark, he forthwith ceased to use the trade mark complained of.

It should be noted that a passing off action lies even in respect of trade marks which are not registered (*Durga Dutt Sarma v. Navaratna Pharmaceutical Laboratories*, 1962 Ker. 156). An infringement action lies only in respect of registered trade-marks.

Proceedings for infringement can be started not only by the proprietor of the trade mark but also in case of his refusal by the registered user of the trade mark. In such cases the proprietor must be made a defendant. In suits for infringement, where the registration or the validity of the plaintiff's trade mark is questioned the issue has to be decided not in the suit itself but by an application for rectification of the register made in the High Court. The High Court and the Registrar have concurrent jurisdiction for entertaining applications for removal of a trade mark from the register, imposition of limitations on the ground of non-user, defensive registration of trade marks and rectification and correction of the register of trade marks but the Registrar can refer such applications to the High Court at any stage of the proceedings.

Appeals : Against an order or decision of the Registrar lies to the High Court and appeals from the decision of a Single Judge on the High Court lies to a Division Bench of that Court.

The rights created by the Trade Marks Act are civil rights for the protection of persons carrying on trade under marks which have acquired reputation. The statute creates the Registrar a tribunal for safe-guarding those rights and for giving effect to the rights created by the Act

No. 231 (b) Suit for passing off goods as plaintiffs goods

1. The plaintiffs have for more than 20 years manufactured and sold hair oil under the name of "Gulshan Hair Oil". The said oil is of a very superior quality and is well known to the public generally and is asked for by the public under that name. No other hair oil is designed or known by the said name.

2. The defendant is a perfumer carrying on business at Chowk, Allahabad.

3. The defendant has wrongfully sold and passed off and is selling and passing off hair oil not of the plaintiffs manufacture as and for the plaintiffs hair oil. He sells and passes off his oil under the name of "Gulbahar Hair Oil" and this misleads the public into the belief that it is the plaintiffs hair oil and thereby causes injury both to the public and to the plaintiffs.

4. Particulars of such wrongful sale and passing off are as follows : (*Give particulars*).

and the High Court has been given appellate jurisdiction over the decisions of this tribunal. The High Court while exercising this appellate jurisdiction has not to exercise it in a manner different from its other jurisdiction. It is merely an addition of a new subject-matter of appeal to the appellate jurisdiction already exercised by the High Court (*National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd.*, A. I. R. 1953 S. C. 357, (1953) S. C. J. 509).

For further discussion of this subject under the Act of 1940, see *Hafizulla v. S. K. Papa*, 146 I. C. 1084, 1933 (Nag.) 344; *Managing Proprietor v. Aronachalam*, 142 I. C. 555; *Anglo Drug Co. v. Swastica Oil Co.*, 36 Bom. L. R. 1165; *Hooghly Flour Mills Co. Ltd. v. Nrityananda Dutt*, 1937 (Cal.) 528; *R. J. Wood & Co. v. Kanshi Ram Hansraj*, 1937 (Lah.) 186; *Biddle Sawyer & Co. Ltd. v. S. Meerasahib & Bros.*, 1937 M. W. N. 271; *Meera Sahib v. Abul Azeiz*, 1937 M. W. N. 1020; *Kharwar v. Motiwala*, 1939 Rang. 98, 181 I. C. 792; *Gaw Kan Lye v. Saw Kyone*, 184 I. C. 167, 1939 (Rang.) 343; *U. Kyaw v. Maung*, 1939 (Rang.) 381, 187 I. C. 37. *K. M. Multani v. Paramount Talkies*, 1942 (Bom.) 241 (Trade mark in name of Film see *Firm Koverji v. Adam Haji*, 1944 (Sindh) 21).

Defence : The defendant may question the registration of the trade mark or its validity, the plaintiff's right of suit and contend that the action complained of falls under S. 30 and does not amount to an infringement. He may also plead determination of the right in the

5. The Hair Oil sold by the defendant is of inferior quality and the sale of it as plaintiffs' hair oil has already caused and will cause a great loss of reputation and consequent damage to the plaintiffs.

6. The defendant intends to sell as "Gulbahar Hair Oil." Oil not in fact the plaintiffs' manufacture and to pass off as hair oil manufactured by the plaintiffs hair oil which is not in fact manufactured by the plaintiffs.

That the plaintiffs claim (i) an injunction restraining the defendant by himself or by his agents from selling or offering for sale as "Gulbahar Hair Oil" oil not of the plaintiffs' manufacture, (ii) Rs. 1000 as damages or in the alternative an account of profits and payment of the amount shown to be due to the plaintiffs or the taking of such account.

TRESPASS TO GOODS (ee)

No. 232—Suit for injury to animal

1. On June 4, 1924, the defendant shot and killed a horse belonging to the plaintiff while the said horse was grazing in the plaintiff's field in village Rampur, pargana and Tahsil Rupar, District Ambala.

said mark, but particulars as to how the right has determined must be given, e. g. that it was not renewed after seven years or that it was abandoned.

Dissimilarity of rival marks is not a complete defence, if the resemblance is sufficient to mislead an incautious purchaser (*Steel Bros. v. Ahmad Ibrahim, supra*). It is no defence that the defendant made special effort to guard against deception (*Lotus v. Mt. Nasiumisa*, 1934 (Cal.) 600. 151 I. C. 5, 38 C. W. N. 265). Mere delay is no defence to injunction (*Abdul Karim v. Abdul Karim, Supra, Devidas v. Alathur*, 1940 M. W. N. 1157, (1940) 2 M. L. J. 793).

Delay in making the application for rectification of the register under Ch. VII of the Trade Marks Act is not *per se* a valid ground for defence. (*Abinash Chandra v. Madhusudan*, 6 D. L. R. (Cal.) 138).

Limitation : Was three years under Art. 40 (now Art. 88). (*C. G. Varcados v. D. C. McLeod*, 51 I. C. 434). This is a continuing wrong and Sec. 22 may be of help.

(ee) In this category are included suits for injury to goods or animals, e. g., theft, misappropriation, mischief, or breach of trust in respect of goods. **The plaintiff must allege that he was in actual**

2. The said horse was worth Rs. 600, and the plaintiff has suffered damage to that extent.

The plaintiff claims Rs. 600 as damages with interest from date of suit to that of payment.

No. 233—Suit for damages for cutting and taking away trees

1. The plaintiff was the owner of 10 *Babul*, 5 *Nim* and 10 *Shisham* trees detailed below.

2. On July 10 and 11, 1959, the defendants cut down without the plaintiff's consent, the said trees, and appropriated the wood thereof, (or, on July 10, 1959, defendant No. 1 wrongfully sold the said trees to defendant No. 2 for Rs. 500, and the latter has cut down the said trees).

3. The trees were worth Rs. 500.

The plaintiff claims Rs. 500 as damages, with interest from date of suit to that of payment.

Details of trees

No. 234—Suit for cutting away plaintiff's crops

1. The plaintiff was owner, and in possession of the sugarcane crop growing on plots Nos. 102, 103 and 104 in village Rupa, Pargana and Tahsil Sadabad, District Mathura.

2. On November 15, 1959, the defendant, wrongfully and without the plaintiff's consent, cut away and appropriated the said crop from the said plots.

possession of the goods (and in that case, he need not show title so long as the defendant cannot claim a better title than his own), or that **he had legal right to immediate possession.** Next the act of the defendant amounting to trespass must be alleged with necessary particulars but without unnecessary details.

It is not necessary that the person in possession must be owner of the property, he may be a hirer or a bailee or pawnee or a carrier. He can even bring a suit against the owner for wrongfully taking away the goods, and recover damages in respect of his limited interest but, in such case, **when the suit is against the owner, the plaintiff must allege, not only his possession, but the limited right under which he was in possession.** In some cases persons having a right of possession though not in possession can also sue such as a bailor (*Kanhya Lal v. Badri Lal* A. I. R. 1965 Raj. 121),

3. The plaintiff has thereby suffered damage.

<i>Particulars of damage</i>				Rs.
Estimated out turn of the said crop	..	..	..	900
Less cost of production	..	..	..	200
				—
Net loss				700

The plaintiff claims Rs. 700 with interest from date of suit to that of payment.

No. 235—Suit for movables appropriated by the defendant

1. One Rahim Baksh was, at the time of his death, owner of the movable property entered in the Schedule appended to the plaint and to be treated as part hereof.

2. The said Rahim Baksh died on November 4, 1920. He left no widow, sister, parents, or grand-parents or any issue except the plaintiff. The plaintiff is his only son. The defendant was the kept mistress of the said Rahim Baksh.

3. At the time of the death of the said Rahim Baksh, the defendant took into her possession the said property and has retained it since and deprived the plaintiff of its use.

4. The plaintiff has hereby suffered damage.

The plaintiff can, against a wrong doer, claim, as damage, the value of the property if the same has been lost, plus such other damages as he might have suffered from being deprived of it. If the property is only partially injured, he must claim damages for such injury, describing the injury. The damage must be calculated according to the value of the property on the date of the wrong and not on any subsequent date (*Rogers v. John King*, 1926 (Cal.) 564, 53 C. 239). If the property is still in possession of the defendant and can be recovered from him, the plaintiff may bring a suit for its recovery, and for damage suffered by its temporary loss. But specific movable property cannot be recovered unless the case falls under S. 7 or S. 8 of the Sp. Rel. Act, 1963, and in all other cases only damages can be recovered. But even when the suit is for specific movables, the plaintiff must claim in the plaint., a specified sum in the alternative, in case the property cannot be found. In that case if the court passes a decree for money in the alternative, the decree can be executed as if it were a money decree, but the procedure of O. 21, R 31 should be followed (*Balmukunda v. B N. Ry.*, 103 I. C. 740, 31 C. W. N. 850,).

Particulars

	Rs.
Value of the property as given in the said Schedule	1,000
Loss of profit which the plaintiff would have made by the use of 12 cows and 2 she-buffaloes for 1 month at Rs. 5 per day	150
The plaintiff claims—	
(a) Return of the said property by the defendant, and Rs. 150 as damages.	
(b) In the alternative, Rs. 1,150, as damages.	

Schedule of property

* * * * *

No. 236—Suit for damages caused by theft

On October 20, 1924, the defendant broke and entered the plaintiff's shop and seized and wrongfully carried away therefrom, a Singer Sewing Machine, and two ironing machines belonging to the plaintiff.

2. By reason of the said wrongful act of the defendant, the plaintiff has been, and, is, deprived of the use of the said machines, and prevented from carrying on his business as a tailor and deprived of the profits he would have otherwise made.

Particulars of damage

	Rs.
Value of the S. S. Machine	300
Value of the two ironing machines	18
Loss of business for 20 days at Rs. 3 per day ..	60

Limitation : The limitation is usually three years under Art. 68 or 91 but the time from which it runs is different under each article. If the plaintiff has lost the goods or the same have been taken away from him by theft, dishonest misappropriation or conversion, time for a suit for recovery of the specific goods or for compensation for wrongfully detaining the same would run from the date when the plaintiff learns in whose possession the property is. Time for a similar suit in respect of any other property, and for one for injuring goods runs from the date when the property is wrongfully taken or injured or when the detainer's

The plaintiff claims—

(1) Recovery of the said sewing and ironing machines of Rs. 318 on account of their value.

(2) Rs. 60 as damages.

TRESPASS ON LAND (ff)

No. 237—Suit for possession against a trespasser

1. The plaintiff was, on November 5, 1924, and still is, owner of the house bounded as follows and situate in Mohalla Alamnagar, Lucknow and had been in possession of it upto the said date :—

Boundaries of the house

* * * *

2. On the said date, the defendant wrongfully broke open the lock and entered into possession, and has since then been retaining possession, of the said house, without the plaintiff's consent.

3. The letting value of the said house is Rs. 20 per month.

4. By reason of the trespass, the plaintiff has suffered damage.

Defence : In such cases, the defendant may plead self-defence, e. g. in shooting a dog attacking the defendant or his rabbits, or an inevitable accident, e. g., in the shooting off of a gun. He may plead some lawful excuse, e. g., a right to distrain the crop, etc., or may plead legal authority under a warrant of process or a right to cut trees under some custom, but the fact that he used the court for the purpose of his trespass is in itself no good defence and he is responsible for the natural and probable consequences of his acts whether they arise from the law's delay or from any other cause (*Udharam Vassanmal v. Grahams Trading Co. Ltd.*, 1937 (Sind) 281). He can deny the plaintiff's title to property and plead a paramount title in himself, but, if the plaintiff was in possession, the defendant cannot plead title in a third person. If the defendant has lawfully obtained possession of the property of the plaintiff and is sued for refusing to deliver it back, he may plead that he has a lien on it for his charges, e. g., a tailor having a lien for his wages.

(ff) Trespass may be committed either by wrongfully entering upon the land of the plaintiff, or, having entered upon it lawfully, by remaining on it without the plaintiff's consent and against his will, or by doing any act affecting the sole possession of the plaintiff, e. g., by storing

The plaintiff claims—

- (1) Possession of the said house.
- (2) Loss already suffered between November 5, 1924, and November 10, 1924 (the date of the suit) at Rs. 20 a month, Rs. 4.
- (3) Continuing damages at the aforesaid rate of Rs. 20 until delivery of possession to the plaintiff.

bricks on the land or by driving pegs in the plaintiff's wall or by opening niches or almirahs in it, or by constructing a balcony overhanging the plaintiff's land. If a person having a limited right of entry exceeds the right, he is a trespasser. A person who is in possession under a void lease is also a trespasser and can be ejected as such (*Bank of Upper India v. Harnath*, 93 I. C. 852). If the only trespass consists in the doing of an act injuriously affecting the property, a suit for damages would be sufficient. In such cases, the practice of praying for a mandatory injunction to compel the defendant to right the wrong he has committed, e. g., to fill up the niches or to remove the pegs, etc., is not always right (*Ewin v. U. Po*, 104 I. C. 139, 5 R. 404). If the plaintiff can himself remedy the wrong, he may only claim cost of doing so as his damages, in addition to any other damages. If, however, the plaintiff cannot do so because the doing of it involves the plaintiff's going on the defendant's land, a suit for a mandatory injunction is proper. For instance, if the defendant whose house is behind that of the plaintiff makes any niches on his side of the wall belonging to the plaintiff, the plaintiff must claim a mandatory injunction against the defendant to close the niches. Similar relief may be claimed in respect of constructions made by the defendant on joint land. The fact that a question of title also may have to be incidentally gone into in determining the plaintiff's right to injunction is no objection to the maintainability of such a suit (*Veerappa v. Arunachalam*, 160 I. C. 933, 1936 (Mad.) 200).

As against a person who has taken possession of the plaintiff's land, or who, having obtained possession under a right, does not leave it on the determination of the right, the only suit will be for possession and mesne profits. In such cases money compensation is not adequate (*Dip Narain v. Jagmohan*, 87 I. C. 15, 1925 (All.) 576). The fact that the trespasser has erected buildings on the land will not necessitate a suit for a mandatory injunction against the defendant to pull down the building. The suit will be one for possession, though the defendant may be allowed to take away his materials (*Narayan v. Lakshmanrao*, 25 I. C. 286).

Such suit may be brought either within six months of dispossession under Sec. 6, Sp. Rel. Act, or within 12 years as regular suit. The former suit is based essentially on plaintiff's previous possession and subsequent dispossession and the question of title of either party does not arise. Plaintiff must be restored to possession, whether he has or has not

No. 238—Suit for possession under Sec. 9 Sp. Rel. Act

1. The plaintiff was, upto November 21, 1924, in possession of the property detailed below.

Description of immovable property

* * * *

2. On November 21, 1924, the defendant dispossessed the plaintiff of the said property, without the plaintiff's consent and otherwise than in due course of law.

The plaintiff claims recovery of possession of the said property.

any right to remain in possession and whether the defendant has or has not a right to eject him. Such suits can be instituted on half the ordinary court-fee, and are very useful when the position is such that the plaintiff cannot succeed in a title suit, and, if he is restored to possession, the defendant cannot eject him by a regular suit.

The only points that are necessary to be alleged in such a suit are, (1) that plaintiff was in possession, (2) that he has been dispossessed by the defendant within six months of the suit, (3) that he has been dispossessed without the plaintiff's consent and otherwise than in due course of law. A landlord who has put a tenant in actual possession cannot bring a suit under Sec. 9 of the Sp. R. A., 1877 (Corresponding to S. 6 of the Act of 1963) against a person dispossessing the tenant (*Sita Ram v. Ramlal*, 18 A. 440; *Verraswami v. Venkaatchala*, 92 I. C. 20, 50 M. L. J. 102, 1926 (Mad.) 18; *Goma v. Narsinghbrao*, 20 B. 260.) (The Calcutta and Madhya Pradesh High Courts have however taken a different view (*Nrittolal Mitter v. Rajendra Narain*, 22 Cal. 562; *Nandlal Pd. v. Raghunath*, 1963 M. P. L. J. Notes 87). But a mortgagee in possession through a tenant can (*Rathanasbapathi v. Ramaswami*, 33 M. 452, 20 M. L. J. 301), but a landlord can bring a suit with tenant as co-plaintiff (*Bhojraj v. Shesrao*, 1949 (Nag., 126). The Bombay High Court has ruled in *Ratan Lal v. Amar Singh*, 53 B. 773, 1929 (Bom.) 467, 31 Bom. L. R. 1042, that a landlord can sue under Sec. 6 joining his tenant as *pro forma* defendant if the latter refuses to join as plaintiff. A suit under Sec. 6 can be brought even by a person who was in joint possession with another, but has been dispossessed by the latter (*Ajiman v. Raisat*, 19 C. W. N. 1117, 28 I. C. 520), and in such a case a decree for joint possession can be passed (*Ballabh Das v. Gurdas*, 1940 (All.) 225, 189 I. C. 92). Such a suit cannot, however, be brought against the Government. A decree in a suit under Sec. 6 is final and not open to appeal, the remedy of the defeated party being by a regular title suit.

A person who is put in possession by a Magistrate under Sec. 145 cannot be sued under Sec. 6 (*Azimuddin v. Alauddin*, 43 I. C. 193, 22 C. W. N. 931.). A suit for *mesne profits* cannot be joined with a suit

No. 239—For possession on the ground of possessory title

1. The plaintiff is a resident of village Namkoli, pargana Barla, district Aligarh, and had, upto the date hereinafter mentioned, been in possession of plot No. 272 in the *abadi* of the said village by keeping his cattle and fodder on it for over 50 years.

under Sec. 6 (*Tbavasi v. Arumagam*, 28 I. C. 1; *Tilak Chandra Fatik Chandra*, 25 C. 803; *Nazir Ahmad v. Abid Ali*, 8 A. L. J. 910, 11 I. C. 387; *Abdul Kadi v. Uthumansa*, 102 I. C. 661), nor can an order for removal of structures be claimed (*Sona v. Prakash*, 1940 (Cal.) 464).

A regular suit may be based on plaintiff's title in which case his previous possession is immaterial except for the purpose of limitation or it may be based on previous possession. Even if a suit is based on title, court may give decree on the ground of previous possession (*Karuppanan v. Sundara Raja*, 1940 (Mad.) 71). A suit under Section 6 is maintainable in the Civil Court even in respect of agricultural land as such a suit does not lie in the revenue court (*Maya Ram v. Gopal*, 1961 R. L. W. 636; *Yar Mohd. v. Laxmidas*, 1959 All. 1).

Possessory title : The Allahabad, Madras, Rangoon, Patna, Nagpur and Bombay High Courts and the Oudh Chief Court had held, on the analogy of the English law, that a plaintiff can succeed merely on the basis of his previous possession, even though he has no valid title, against a person who has no title better than his (*Mustafa v. Santha*, 23 M. 179; *Pemraj v. Narayan*, 6 B. 215; *Govind v. Mohan*, 24 A. 157; *Krishnrao v. Vasudeo*, 8 B. 371; *Wali Ahmad v. Ajudhia*, 13 A. 537; *Makhdam v. Hashim*, 33 A. 174; *Ganesh v. Dassu*, 103 I. C. 428, 25 A. L. J. 857; *Ramdayal v. Sarwati*, 99 I. C. 568, 25 A. L. J. 287, 49 A. 191; *Ma Pwa Zon v. Ma Pon*, 102 I. C. 696, 5 R. 154; *Bodhan v. Ashloke*, 1927 Pat. 1; *Prince Rangit v. Jahari*, 8 Pat. 351, 119 I. C. 906, 1929 (Pat.) 601; *Sbiv Saran Rai v. Sukhdeo Rai*, 1937 (Pat.) 418, 171 I. C. 371; *Sohan Lal v. Shaikh Mohammad Hussian*, 1930 (Oudh) 374; *Gajraj Puri v. Raja Ram*, 1937 A. W. R. 1140, 1937 A. L. J. 1189; *Ramanlal v. Bhaiya*, 1937 (Nag.) 281) *Panchvati Ram Chandra v. Satybhama Devi* A. W. R. 1971 Oti. 135 A possessory title is good against the whole world except the real owner, (*Subodh Bose v. Province of Bihar* 1950 (Pat.) 222, A. I. R. 1966 Pat.75, *Mata Badal Singh v. Bhaiya Hanumant Singh* 1950 A. L. J. 615).

For instance a widow in possession of her husband's Estate in lieu of dower is entitled to retain possession but if she loses possession to the heirs she would not be able to get it back on her possessory title (*Mashal Singh v. Ahmad Hasan* 1950 All.407). It has been held that possessory title can be transferred even after dispossession of the transferor (*Jan Mohd. v. Habib* 1943 (Oudh) 330.) The difference between a suit on possessory title and one u/s 9 specific relief Act 1877 is that in the latter case title of either party is irrelevant and the question is

2. On December 4, 1959, the defendant, wrongfully and without the plaintiff's consent, dispossessed the plaintiff and has entered into possession of the said land, and is still in possession.

The plaintiff claims to recover possession of the said land.

whether defendant has dispossessed the plaintiff within six months. If this is so even the better title of defendant will not help him. (*Ganga Din v. Gokul Pd.* 1950 (All.) 407). Thus the widow whose possession in lieu of dower was lost would succeed even against heirs in a suit u/s 9. It has been held that a suit on possessory title can be filed even after failure in a suit u/s 9 (*Bambali Kuppum v. Padamnabha* 1945 (Mad.) 245). The Calcutta High Court, however, did not agree with this view and held that no suit on possessory title could be filed except under Sec. 9 Specific Relief Act (*Nish Chand v. Kanchi Ram* 26 C. 579. *Yar Mohd. v. Paonioclu* 1925 Cal. 1225).

The controversy has now been settled by the authoritative pronouncement of the Supreme Court in *Nair Service Society v. K. C. Alexander* A. I. R. 1968 S.e. 1165. It was held that Secs. 8 & 9 of the Specific Relief Act 1877 (Corresponding to Secs. 5 & 6 of the Specific Relief Act 1963) were not mutually exclusive, and Sec. 9 does not base a suit on prior possession within 12 years and in such a suit title need not be proved unless the defendant can prove one.

The plaint should therefore clearly show the right on which it is based.

Next to the title of the plaintiff, should be alleged the dispossession by the defendant, or plaintiff's discontinuance of possession if the suit is on that ground. If it is on the ground of plaintiff's paramount title, the fact that the defendant is in possession should be alleged.

The suit for possession may be brought by anyone who is affected by the wrong, but a person to whom a license to build upon land has been granted cannot bring a suit against one already in wrongful possessions (*Manbahal v. Ram Ghulam*, 103 I. C. 43 All.). But a licensee who is in possession and has some interest in land, e.g., has put cattle trough etc. on it can sue for possession if dispossessed (*Pannalal v. Anant*, 1946 All. 284; *Mahadev v. Palakdhari*, 1960 All. 743, 1957 M. P. 44).

Limitation : The old controversy as to whether Art. 142 or 144 of the Lim. Act 1908 was to govern a particular suit for possession has now been set at rest and will not arise under the Lim. Act of 1963. Under the Act of 1963, all suits for possession have been divided in two categories, e. g., suits based on title and suits not based on title. For all suits for possession based on title Art. 65 applies in which the limitation is 12 years and starts from the date when the possession of the defendant becomes adverse to the plaintiff. If the suit is not based on title but is based on previous possession and dispossession it will be governed by

No. 240—Suit by one co-sharer against another

1. The plaintiff and defendant are joint owners of plot No. 102 in the *abadi* of village Rampur, pragana Malihabad, district Lucknow which has, upto the date hereinafter mentioned, been used by the parties as a threshing ground.

Art. 64, and the Limitation of 12 years will start from the date of dispossession. Suits based on what is known as possessory title is really a suit based on previous possession and not on title and will, therefore, be governed by Art. 64.

A suit for possession by a co-sharer against another co-sharer or the transferee of a co-sharer will essentially be a suit based on title and will fall under Article 65. In such a case the defendant's possession will become adverse only from the date of ouster as till ouster is proved the possession of the co-sharer is presumed to be on behalf of all.

Joint Owners : One of the several co-sharers in a property can eject a trespasser (*Sri Thakurji v. Hiralal*, 20 A. L. J. 609, 44 A. 634; *Syed Ahmed v. The Magnasite Syndicate Ltd.*, 39 M. 501, 29 I. C. 60, 28 M. L. J. 598; *Govind v. Kasmirao*, 102 I. C. 195; *Moti Lal v. Basantlal*, 1956 All. 175). even if such a trespasser is in possession under a lease from one of the joint co-sharers. In such cases, the other co-sharers are generally made defendants and a decree should be claimed by the plaintiff for himself and on behalf of his co-owners (*Sheodial v. Parbati*, 22 I. C. 841, 12 A. L. J. 23). The Calcutta High Court, however, holds that in such cases the right of other co-sharers is only to get the land partitioned (*Gajadhar v. Bhikari*, 18 C. W. N. 1011, 27 I. C. 228; *Bharani v. Rajagopal*, 70 C. L. J. 199). The Lahore High Court has also held that when the majority of co-sharers have allowed a third person to build on joint land, others cannot have the building demolished (*Amar Singh v. Jatmal*, 8 L. L. J. 313, 94 I. C. 995).

One co-owner cannot appropriate any part of the joint land to his own exclusive use by building upon it, nor can he build on a joint party wall (*Ikramulla v. Muhammad Yunis*, 30 I. C. 33, 13 A. L. J. 473). The plaintiff may, in such cases, sue for injunction to restrain the defendant from doing such act, or for removal of such act of trespass, if already completed, but such a suit must be brought with promptitude, otherwise unexplained delay may be taken as acquiescence. A suit for injunction against a co-sharer for removal of constructions made by him on joint land has been held by the Lahore High Court to be governed by Art. 32 and not Art. 125 of the Limitation Act (*Bhagwan v. Bhagwan* 121 I. C. 186, 1930 (Lah.) 283).

It has been held in Calcutta that a co-owner cannot have a building erected by another co-owner demolished without proof of an special injury to himself (*Annanda v. Parbati*, 3 C. L. J. 198). But according to Allahabad High Court and the Oudh Chief Court, this is not necessary

2. On January 2, 1924, the defendant commenced to build a house on the said plot, without the plaintiff's consent, and has constructed walls to the height of two feet. Notwithstanding a duly registered notice sent to him by the plaintiff by post requiring him to cease building and to remove the said constructions, the defendant is continuing to erect the same and thereby threatens and intends, unless restrained from so doing, to complete the said house.

(*Ram Bhadur v. Ram Shanker*, 2 A. L. J. 455; *Amjad Ali v. Bismillah*, 184 I. C. 266, 1939 R. D. 590, 1940 (Oudh) 24), and a construction, even a temporary one, if found to be a step towards an exclusive use of the land, can be demolished, but not one (*like a cattle trough*) which is not of such a character (*Shankar Lal v. Pati Ram*, 168 I. C. 650, 1937 (All.) 293). The Punjab Court took the same view as Calcutta but in the cases of *Attar v. Kupa*, 1926 (Lah.) 175, 92 I. C. 297, and *Mangat v. Gbulam*, 166 I. C. 148, 8 R. L. 1028, it has been held that special injury is not necessary to be proved. The plaintiff should allege joint title in the property, and facts showing an invasion of such joint right, and further, according to Calcutta view, injury to the plaintiff. If there has actually been an injury it should, in any case, be alleged as, after all, injunction being a discretionary relief, the injury will be an additional ground for granting it. If the co-owner who erects a building has been in exclusive possession of the land, the building will be maintained if it is in keeping with the purpose for which he has been exclusively using the land, but not otherwise, e. g., one using land as a cattle trough cannot build a sitting room on it (*Sheo Harakh v. Jai Govind*, 104 I. C. 414 All.).

If co-owners are, by mutual consent or by private arrangement, in separate possession of portions of the joint property, anyone dispossessed by the other can sue for the latter's ejectment (*Kuldip v. Jagnandan*, 1923 (All.) 363; *Jagannath v. Badri*, 34 A. 113, 9 A. L. J. 48, 11 I. C. 768; *Durga v. Khunkur*, 27 C. L. J. 441, 45 I. C. 705; *Hardeo v. Chandka*, 52 I. C. 7, 6 O. L. J. 278). If one co-owner is in peaceful possession without any ouster or exclusion of others, he is under no obligation to render accounts or to pay compensation even if he is in possession of more than his share of land (*Chandra v. Bishesar*, 32 C. W. N. 291).

The rights and liabilities of co-sharers inter se and what amounts to ouster has been dealt with at some length in *Sant Ram Nagina Ram v. Daya Ram*, 1961 Punj. 528.

In such cases he must plead in the plaint either an express arrangement or facts from which mutual consent could be implied, e. g., long exclusive possession without let or hindrance (*Jalaluddin v. Rampal* 4 O. W. N. 871, 2 Luck. 740).

Parties : One of several co-owners can sue to eject a trespasser; but all persons in joint possession as trespassers must be joined as defen-

3. The said constructions will interfere with the plaintiff's rightful enjoyment of the said land as threshing ground.

The plaintiff claims—

(1) An order to the defendant to demolish the constructions made by him.

(2) Joint possession on the land occupied by the construction.

dants (*vide* Chap. XI). A servant or wife or relative of the trespasser cannot be sued without impleading the latter as even a wrongful possession implies more than physical possession of a person (*Shivalinga v. Kumodinei*, 1930 (All.) 224).

Court-fee is ad valorem on the value of the property which is determined in case of land, houses and garden by the rules laid down in Sec. 7 (v), Court-fees Act.

Defence : A defendant may justify a temporary trespass on the plaintiff's land by (1) an easement acquired by him, (2) a license or permission of the plaintiff himself or of any person who had authority to give it, (3) self-defence or defence of goods or animal, (4) acts of necessity, e. g., to abate a nuisance or to put out fire, (5) authority of law, e. g., execution of legal process. In a suit on the ground of dispossession, the defendant may plead that the dispossession took place more than 12 years before the suit or that he has a better title than the plaintiff. In every case of possession on the ground of title, the defendant may allege that he has become owner by adverse possession for over 12 years, but there can be no title by possession even for over 12 years unless the possession is shown to have been adverse. As against Govt. title by prescription can be completed by 30 years' possession (Art. 112). As against local authorities e. g., Municipal Board and District Board 30 years' adverse possession is needed to mature the title by prescription (Art. 111). The construction of a temporary shed on waste land which is not of immediate use to the owner is not adverse possession (*Shah Nawaz v. Ghulam Shah*, 40 P. L. R. 91, 1938 (Lah.) 324, 176 I. C. 930), nor can the mere use of such land by a neighbour in various ways which are convenient to him (*Kaladhari v. Jabachh*, 181 I. C. 275, 1939 (Pat.) 399). Adverse possession need not be to the knowledge of the owner (*Kuppuswami v. Kuppaswami*, 1941 (Mad.) 866; *Raghubar v. Balla*, 1941 (Nag.) 311; *Saroj v. Kumar*, 45 C. W. N. 126). If the defendant was a co-sharer with the plaintiff he cannot succeed on the plea of adverse possession merely on proof of long possession but must show definite exclusion or ouster of the plaintiff as in law generally possession of one co-owner is possession of all (*Vishnu v. Mahadeo*, 43 Bom. L. R. 971; *Khem Chand v. Daya Ram*, 1941 (Sindh) 50, 194 I. C. 137; *Muhammad Amir Uddin v. Mahmud Abdul*, 1941 (Nag.) 343; *Jwala v. Jagdish*, 1941 (Lah.) 144, 195 I. C. 244). In every case, particulars of the defence set up should be given. A trespasser cannot claim compensation for im-

(3) A permanent injunction to restrain the defendant from making any constructions on the said land without the consent of the plaintiff.

No. 241—Suit for joint possession (gg)

1. Khuda Baksh, the father of the parties, was owner of the property detailed at the foot of the plaint.

2. The said Khuda Baksh died in 1924, leaving the plaintiff, his daughter, and the defendant, his son, as his only heirs.

3. On the death of the said Khuda Baksh, the defendant took exclusive possession of the said property and has been in possession ever since.

The plaintiff claims joint possession of the said property to the extent of her legal one-third share.

provements made by him with knowledge of his want of title (*Venkata v. Bayyanna*, 7 Mys. L. J. 82). or for building erected without owner's consent (*Barkatali v. Abdul Rahman*, 114 I. C. 696 Pat.) nor can he merely by erecting costly buildings claim a right to retain possession or to compel the plaintiff to receive compensation for the land (*Ganga Din v. Jagat*, 12 A. L. J. 1026). In a suit against a co-owner the defendant may plead acquiescence of the plaintiff, or that the alleged trespass is only an enjoyment of the property by the defendant and not an infringement of the plaintiff's right, or that the land on which the alleged trespass is said to have been committed has been in long exclusive possession of the defendant by consent of the plaintiff. He can claim compensation for reconstructing the joint property if he did it without protest from the plaintiff and not with a view to embarrass him at the time of partition or at an inordinate expense (*Radhey Shiam v. Mohammad Nasir*, 168 I. C. 472, 1937 Oudh 394).

(gg) A person who is entitled to possession of a property jointly with the defendant is entitled to a decree for joint possession, unless it can be held on considerations of equity and good conscience that he has lost that right (*Srish Chandra v. Mathura*, 102 I. C. 148). In certain earlier rulings of the Allahabad High Court it was laid down that if a person was not previously in possession of a property he could not be put in joint possession and was only entitled to a decree for declaration of his title, but it has been held in *Jagannath v. Ramphal*, 8 A. L. J. 131, 34 A. 150, 13 I. C. 79; *Hanuman Prasad v. Mathura Prasad*, 26 A. L. J. 992, that his previous possession and dispossession are not necessary conditions precedent of his obtaining such a decree. Order 21, Rule 35, (2) lays down how a decree for joint possession can be executed and, as it is not necessary to put the plaintiff in actual possession under the

No. 242—Suit against alienee of a joint co-sharer (hh)

1. The plaintiff and defendants Nos. 3 to 8 are joint owners of the land specified at the foot of the plaint.

2. The said land was in possession of one Ramjas as tenant of the plaintiff and defendants Nos. 3 to 8 upto 1334 *Fasli* after which he abandoned it.

3. Defendant No. 5 let the said land to defendants Nos. 1 and 2 for 10 years and defendant Nos. 1 and 2 took possession from 1335 *Fasli*.

(Or. 2. The said land is part of the joint *abadi* of village—, and has been lying vacant.

3. Defendant No. 5 sold the said land by a sale-deed dated July 20, 1926 to defendants Nos. 1 and 2 who have erected a *Kolhu* on it).

decree, no injustice can ordinarily result from such a decree. Still there may be cases in which such a decree can very well be refused. If a co-sharer in separate possession of *abadi* lands builds a house thereon or transfers it to a third person, the other co-shares can sue for joint possession (*Mohammad Sher Khan v. Bharat Indu*, 25 A. L. J. 983, 106 I. C. 656). The other co-sharers need not be joint (*Kuchibhatta v. Kuchibhatta*, 95 I. C. 856, 1926 (Mad.) 809). But when one co-sharer was in exclusive possession of joint land without any objection by other co-sharers without denying their title and he let to a third party an area smaller than what he would get on partition, the High Court refused to give joint possession of the land to other co-sharers (*Bibi Aimana v. Sarurannessa*, 32 C. W. N. 449). One co-sharers cannot obtain exclusive possession of joint undivided property from another co-sharer. He can at the most have joint possession with the other co-sharer or a declaration of his specific share. (*Hubai Mitter v. Hajibai Abubai*, 1950 Oudh 40).

The plaint should allege the plaintiff's title to the property and the defendant's possession of it. The date from which the defendant's possession is said to have become adverse must also be given, if such is the case.

If a decree for joint possession is not executed and joint possession (which may be symbolical) has not been obtained, the decree-holder cannot subsequently bring a suit for partition (*Sabjan v. Hasanulla*, 101 I. C. 622, 31 C. W. N. 406, 1927 (Cal.) 411, 54 C. 554).

(*hh*) The possession of the alienee in such cases becomes adverse to the other co-sharers as soon as they enter into possession and Art. 144 of the old limitation Act was applied to such cases (*Ibrahim v. Ali Md.*, 116 I. C. 819). However, in some cases it has been held that possession

The plaintiff claims—

(1) Ejectment of defendants Nos. 1 and 2 from the said land.

(2) Joint possession with defendants Nos 3. to 8.

of an alienee from a co-owner is adverse to other co-owners only when there is an ouster of other co-owners (*Ghulam Nabi v. Umar Bakht*, 1941 Lah. 307). Where a person purchases property held in common by several tenants in common from one of such tenants in disregard of the title of other co-tenants, possession of the latter becomes adverse to the purchaser from the date of his purchase. (*Nizamuddin v. Mangal Sen*, 1949 All. 699).

III—PLAINTS IN OTHER SUITS

No. 243—Administration suit (a)

(By a creditor)

1. George Kellner, late of Allahabad, was, at the time of his death, and his estate still is, indebted to the plaintiff in the sum of Rs. 4,000 and interest, due under a simple money bond executed by him in favour of the plaintiff on December 20, 1922.

2. The said George Kellner died intestate on March 24, 1924.

3. The defendant has obtained Letters of Administration of his estate, and has possessed himself of all the movable and immovable property of the deceased, but has not paid the plaintiff his debt.

The plaintiff claims that an account may be taken of the movable and immovable property of George Kellner deceased, and that the same may be administered under the decree of the court.

(a) Such a suit may be filed either by any creditor of the estate or by a legatee or heir of the deceased; but if the creditor is a decree-holder his decree must be capable of execution and therefore a suit is not maintainable if the decree is barred by time or cannot be executed without leave of the Court of Wards which has not been obtained (*Lachmi Narayan v. Md. Mehdi* (21 P. L. T. 947). In an administration suit whether by an heir or a creditor it is necessary to claim that the estate of the deceased may be collected from wherever it is, that the debts due by the deceased may be ascertained and collected, that the parties entitled to a share in the estate after payment of the debts, be ascertained with their respective shares and that eventually whatever remains out of the estate after payment of the debts due by the deceased might be distributed among the heirs or persons entitled thereto proportionately. (*Sebastias Antontio v. Rudolf Minguel Texeira*, 1962 Bom. 4). All the creditors are not necessary parties (*Mt. Shahzadi v. Mt. Rahmat*, 1937 (Lah.) 761), though they are proper parties. If any creditor does not come in and prove his debt, an arrangement made under the decree of the court for rateable distribution of the assets amongst other creditors cannot be disturbed (*Kisandas v. Jivat Lal*, 1936 (Bom.) 423). But such suit cannot be brogght in respect of the assets of a deceased Hindu who died joint with his son and leaving no separate property (*Meenakshi v. Ramaswami Chettiar*, 184 I. C. 183, 1939 (Mad.) 552). nor by a Hindu reversioner

No. 244—Suit for administration by creditor on behalf of himself and all other creditors

(Form No. 41, Appendix A., C. P. C.)

1. E. F., late of , was, at the time of his death, and his estate still is, indebted to the plaintiff in the sum of

[Here insert nature of debt and security, if any]

2. E. F., died on or about the day of . By his last will, dated the day of , he appointed C. D. his executor (or devised his estate in trust, etc., or died intestate, as the case may be).

3. The will as proved by C. D. [or, Letters of Administration were granted, etc.)

4. The defendant has possessed himself of the movable [and immovable, or the proceeds of the immovable] property of E. F. and has not paid the plaintiff his debt.

The plaintiff claims that an account may be taken of the movable [and immovable] property of E. F. deceased, and [that the same may be administered under the decree of the Court].

No. 245—Suit for administration by specific legatee

(Form No. 42, Appendix A., C. P. C.)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and commence paragraph 2]

E. F., late of , died on or about the day of . By his last will, dated the day of , he appointed C. D. his executor, and bequeathed to the plaintiff [here state the specific legacy].

gainst a widow (*Bai Vidvagauri v. Chaturdas*, 1940 Bom. 411). The procedure of the court in such suits is determined by O. 20, R. 13, C. P. C. Usually a receiver is appointed in whom the whole property of the deceased vests, and no creditor can, after that, take any proceeding against such estate (*Durgadutt v. Bholaram*, 102 I. C. 413, 29 Bom. L. R. 409). If any creditor takes any proceeding, e.g., a proceeding for execution of his decree, the court has power to restrain him from doing so (*Nicholson Town Bank Ltd. v. Vardarajubi Naidu*, 1938 M. W. N. 1127, 48 L. W. 849). The court can direct any party to hand over to the

For paragraph 4, substitute—

The defendant is in possession of the movable property of E. F. and, amongst other things, of the said [*here name the subject of the specific bequest*].

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that, etc.

No. 246—Suit for administration by pecuniary legatee

(Form No. 43, Appendix A, C. P. C.)

(*Alter Form No. 41 thus*)—

[*Omit paragraph 1 and substitute for paragraph 2*]

E. F., late of , died on or about the day of . By his last will, dated the day of , he appointed C. D. his executor and bequeathed to the plaintiff a legacy of rupees.

In paragraph 4, substitute “Legacy” for “debt.”

Another form

E. F., the above named plaintiff, states as follows :—

1. A. B. of K. in the died on the day of . By his will, dated the day of , he appointed the defendant and M. N. [who died in the testator's lifetime] his executors, and bequeathed his property, whether movable or immovable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should

receiver any assets in its possession, but a disputed debt is not such an asset and an order for its payment to the receiver cannot be passed (*Ahmad Din v. Mohammad Taqi*, 163 I. C. 363, 1936 (Lah.) 365). The receiver can of course bring a suit for recovery of such debt. Court-fee is payable as in a suit for accounts. In order to avoid multiplicity of suits, the court has power to implead in such suit a person who alleges himself to be the heir of the deceased (*Maung Tin v. Maung Po*, 103 I. C. 22). A formal decree for administration should be passed before the estate is actually administered (*Girmault Co. v. Premji*, 125 I. C. 910, 32 Bom. L. R. 414), but the court is not bound to make an order for administration if the questions between the parties can be properly determined

attain twenty-one or a daughter who should attain that age or marry, upon trust as to his immovable property for the person who would be the testator's heir-at-law, and as to his movable property for the person who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death, entitled to movable and immovable property; the defendant entered into the receipt of the rents of the immovable property and got in the movable property; he has sold some part of the immovable property.

The plaintiff claims—

(1) To have the movable and immovable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken.

(2) Such further or other relief as the nature of the case may require.

No. 247—Administration suit by an heir

1. The plaintiff's husband, Abdulla Khan, a Sunni Musalman, died in September 1929, leaving behind him, as his sole heirs, the plaintiff, his widow, defendant No. 1, his father, defendant No. 2, his mother, defendants Nos. 3 to 6, his children by the plaintiff, defendant No. 7 and one Abdul Kadir now deceased, his sons by Mt. Kamia, his first wife who had predeceased him. He left no nearer relative.

without such order (*Kisandas v. Jivat Lal*, 1936 (Bom.) 423). A suit for partition and administration may be joined if a residuary legatee wants his share out of unascertained residue (*Jiban Krishna v. Jitendra-nath*, 1949 F. C. 64).

If a Hindu widow is a party to an administration suit she can, on application, obtain an order for her future maintenance, but no order for arrears of maintenance can be passed in such a suit (*Maha Sabha v. Anna Sohan*, 104 I. C. 119, 6 Bur. L. J. 105).

In such a suit a Court is not debarred from deciding question of title to property wholly situate outside its jurisdiction (*Amir Bi v. Abdul*

2. The said Abdul Kadir one of the sons of Abdulla Khan by his predeceased wife Mt. Kamia also died in June 1930, and defendant No. 8 his widow, and defendants Nos. 9 to 17 his sons and daughters are his only heirs, there being no nearer relatives.

3. The said Abdulla Khan was at the time of his death a partner in the firm Abdulla Khan and Ahmad Karim carrying on a leather export business at Kanpur, and the plaintiff believes that his share in the assets of the said firm was about a lakh of rupees.

4. The said Abdulla Khan also left some houses and immovable property mentioned in Schedule A attached to the plaint which would be deemed to be part hereof. He also left considerable cash and movable property the exact extent of which the plaintiff does not know. Such property so far as is known to the plaintiff is shown in Schedule B attached to the plaint which should be deemed to be part hereof.

5. At the time of the plaintiff's marriage with the said Abdulla Khan on April 20, 1907, it was verbally agreed between the plaintiff's father and guardian, Iftikhar Hussain, acting for the plaintiff, and the said Abdulla Khan that the plaintiff's deferred dower should be Rs. 20,000. The whole of the said dower debt has remained unpaid.

6. By a verbal agreement between the said Abdulla Khan and his sons Abdul Kadir and defendant No. 7 on November 20, 1927, the said Abdul Kadir and defendant No. 7 relinquished their rights of inheritance in the estate of the said Abdulla Khan in consideration of the latter giving them the immovable property detailed in schedule C attached to the plaint which should be deemed to be part hereof.

Rahim, 110 I. C. 276, 1928 (Mad.) 760, 55 M. L. J. 266), or from giving to the plaintiff a larger amount than claimed in the plaint (*Onchan Thwin v. Kboo Zun Nee*, 1938 (Rang.) 254, 177 I. C. 501). In a suit by an heir, the court may be asked to partition the residue of the estate amongst the heirs (*ibid*). Such a suit can be filed about the estate of a deceased undivided Hindu father (*Meenakshi v. Ramaswami Chettiar*, 1937 M. W. N. 757, 1937 (Mad.) 785, 173 I. C. 671). But where the

The plaintiff claims—

(1) That an account may be taken of the movable and immovable properties and the assets left by the said Abdulla Khan and that the same administered under the decree of the Court.

(2) That the plaintiff's dower debt of Rs. 20,000 be paid to her out of the said assets.

(3) That the remaining estate and assets of the said Abdulla Khan be divided amongst the plaintiff and defendants Nos. 1 to 6 according to their legal shares.

(4) Alternatively, if the Court finds that the relinquishment, alleged in para. 6 hereof, is not binding on defendants Nos. 7 to 17 they should be directed to restore to the estate the benefits they have received under the said relinquishment and then the estate may be divided amongst all the heirs of Abdulla Khan according to their legal shares.

No. 247-A—Suit by a specific legatee against an executor for his legacy

1. By his last will, dated January 4, 1924, one Ram Sukh of Village Nagore, District Etah, appointed the defendant to be his executor and bequeathed to the plaintiff a legacy of Rs. 4,000 out of his estate.

2. The said Ram Sukh died on January 10, 1924.

3. The defendant proved the said will on April 20, 1924, and has since been in possession of the estate of the said Ram Sukh as such executor.

4. The defendant has, since the date of his possession, been realizing large sums of money and has always been in

sole purpose is to determine who is the rightful heir an administration suit cannot be filed by one rival heir against another. (*Chand Narain v. Ghasiram*, 1940 (Lah.) 179, 189 I. C. 894).

Limitation : Art. 120 (now 113 of the Act of 1963) applies but when the suit is in effect for a legacy Art. 123 was held to apply (*Salebbai v. Bai Safiabibi*, 36 B. 111; *Rajamannor v. Venkat*, 25 M. 361) but now Art. 106 will apply. Suit by a Muhammadan heir against his co-heirs was held to be governed by Art. 144 as regards immovable property and

a position to pay the plaintiff's legacy but has neglected to pay the same.

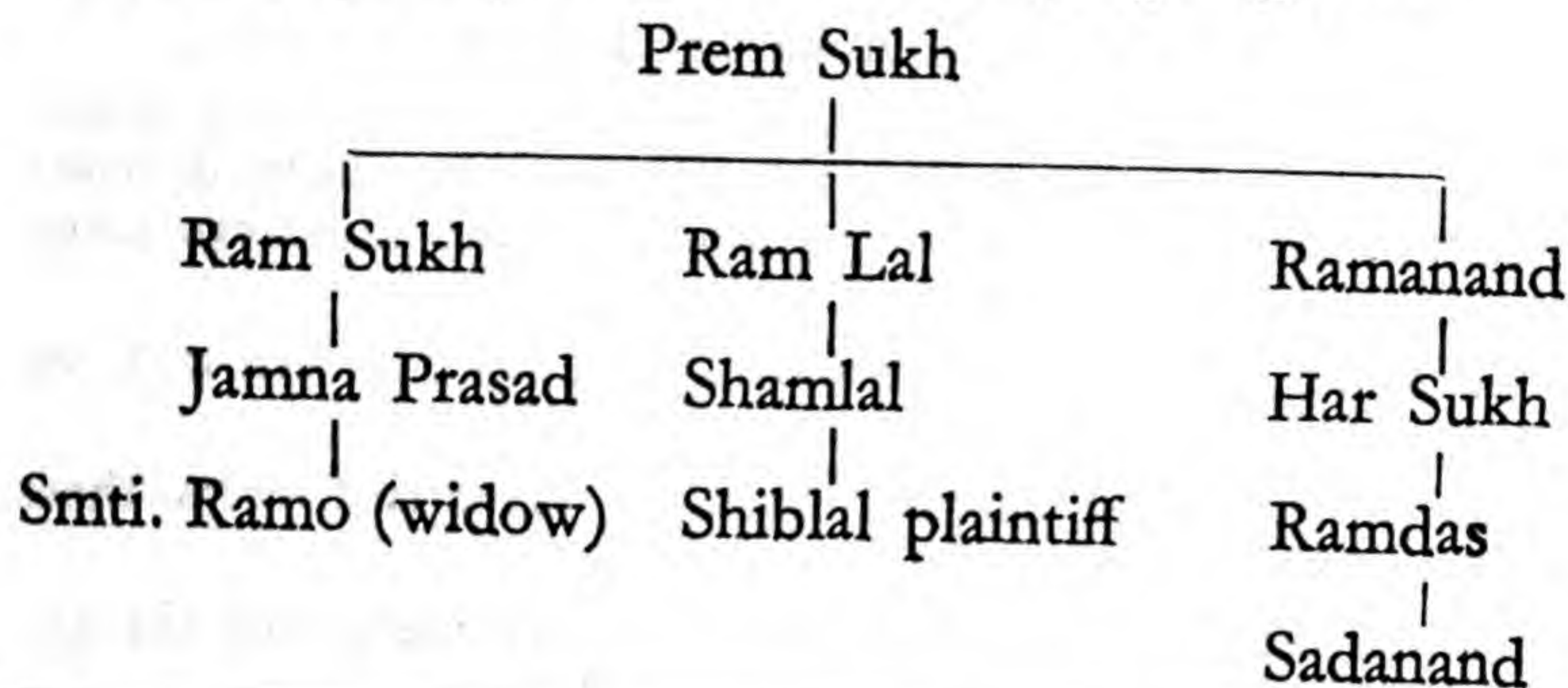
The plaintiff prays that the defendant be ordered to pay to him Rs. 4,000 and interest at 6 per cent per annum from April 20, 1924, or that an account may be taken of the property of the said Ram Sukh and that the same may be administered under the decree of the court.

Note : If suit is against administrator, necessary changes may be made in paragraphs 1 & 3.

HINDU LAW

No. 248—Suit for setting aside an adoption (b)

1. The plaintiff is related to Jamna Prasad deceased, as will appear from the following pedigree :



by Art. 120 as regards movables (*Mohbomedally v. Safiabibi*, 1940 (P. C.) 215 but now the former will be governed by Art. 65 as the latter by Art. 113.

Court Fee : It has been held that an administrator suit is a suit for accounts and court fee is payable on plaintiff's valuation under Sec. 7 (iv) (f) C. F. Act or Sec. 7 (iv) (b) of C. F. Act as amended in U. P. In Madras such a suit has been held covered by Art. 17B of Sch. II of the Act as amended and consequently chargeable with the court fee provided therein, *Kanalam v. Saradambal* A. I. R. 1953 Mad. 576.

(b) The Hindu Adoptions and Maintenance Act (78 of 1956) has made material changes in the Hindu Law of adoption. Prominent among these are :—

(1) A daughter can also be adopted.

(2) Before making the adopting, the adoptive father must obtain the consent of his wife or wives. But if his wife, or any one of his wives, has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, her consent may be dispensed with.

2. The said Jamna Prasad died possessed of considerable immovable property in 1898, and his widow Smt. Ramo defendant entered into possession on his death.

3. All the male persons shown in the above pedigree except Sadanand are dead, and thus the plaintiff is the nearest collateral of Jamna Prasad.

4. The defendant Badri Prasad has wrongfully got his name entered in the Government records as owner of all the property of the said Jamna Prasad, as the adopted son of the said Jamna Prasad, and both the defendants are falsely giving out that Badri Prasad defendant has been validly adopted by Smt. Ramo defendant.

(3) A widow or an unmarried woman or woman whose marriage has been dissolved can adopt without seeking any one's consent.

(4) A married woman whose husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind can adopt without seeking any one's consent.

(5) An orphan can be given in adoption by his guardian with the previous permission of the court.

(6) The person to be adopted must be unmarried unless there is a custom to the contrary.

(7) The person to be adopted must not have completed the age of 15 years, unless there is a custom to the contrary.

(8) If a male adopts a daughter or a female adopts a son the difference between the ages of the persons adopting and adopted must be at least 21 years.

(9) Performance of Datta Homam is not necessary.

(10) Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property transfer *inter vivos* or by will.

(11) If a registered deed of adoption, signed by the person giving and the person taking, is produced in court, the court shall presume that a valid adoption has been made unless and until it is disproved.

Limitation : Such a suit was held to be governed by Art. 118 of the limitation Act and it was held that it must be brought within 6 years of the date when the alleged adoption becomes known to the plaintiff (*Jagmohan v. Deoki Nandan*, 106 I. C. 488, 1927 P. C. 229, 32 C. W. N. 153, 34 M. L. J. 301, 29 Bom. L. R. 1386). The Patna High Court has held that the same limitation would apply even to a suit in which there is an additional prayer for recovery of possession of property from the alleged adopted son (*Ishwari Prasad v. Hari Prasad*, 18 P. L. T. 34, 1927

5. The said Badri Prasad was, as a matter of fact, never adopted by the said Smt. Ramo.

6. In the alternative the plaintiff submits that the said Badri Prasad was 18 years old and could not be adopted because of his age, there being no custom in the community to which the parties belong permitting the adoption of boys aged more than 15 years.

7. In the alternative it is submitted that the said Badri Prasad was an orphan and Ram Prasad (his guardian) who purported to give his consent had not obtained the permission of the District Judge.

8. That no giving or taking actually took place.

The Plaintiff claims—

(1) A declaration that the defendant Badri Prasad is not the adopted son of the said Jamna Prasad.

(2) In the alternative, a declaration that the adoption of Badri Prasad by Smti. Ramo is null and void.

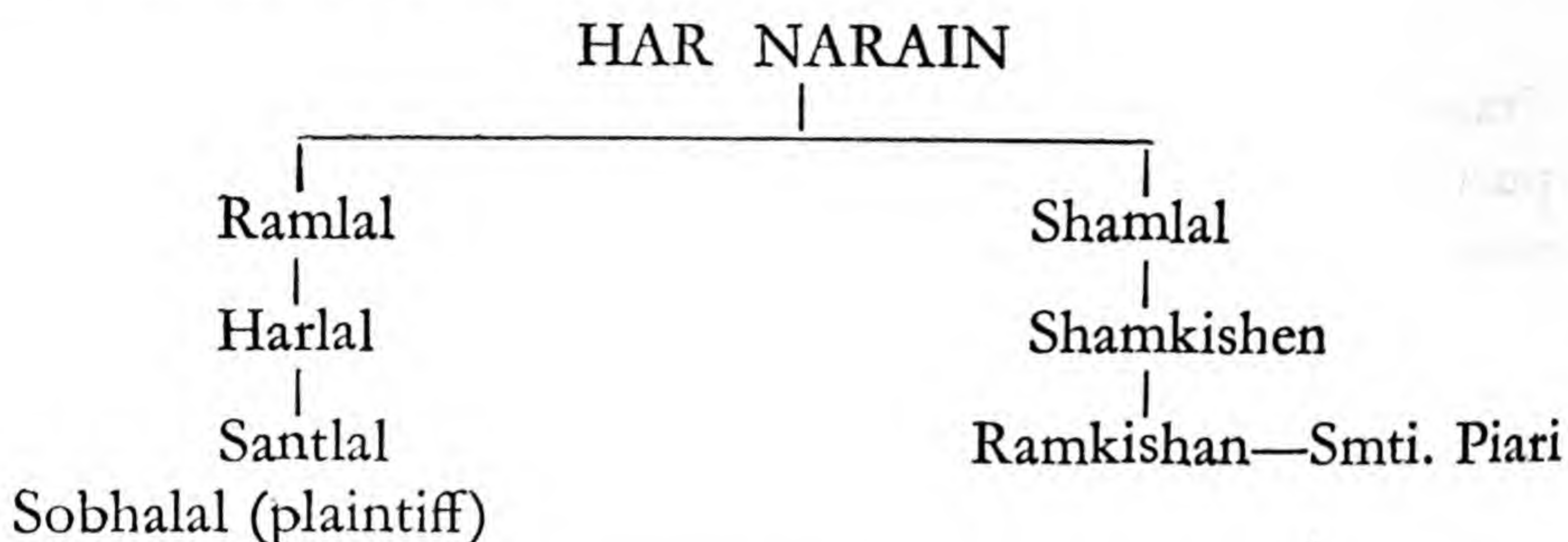
(Pat.) 145); but the Lahore High Court has held that Art. 118 applies only to suit for declaration of invalidity of adoption and not to a suit for possession (*Joli v. Khazana*, 8 Lah. 48, 1926 (Lah.) 654). The omission to bring within the period prescribed by Art. 118 a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place is no bar to bring a suit for possession against a person who claims to be in possession by right of adoption : (*Kalganappa v. Shanbasappa*, 48 Bom. 441 (P. C.), 1924 (P. C.) 137). Now Art. 57 has replaced Art. 118, and the period of limitation has been reduced to 3 years.

Defence : The defendant may affirm the fact of his adoption, if it is denied. He may challenge the ground on which it is sought to set aside the adoption. For instance, if want of authority is alleged by the plaintiff, the defendant may set up authority of the husband, giving particulars of it as to when, how, and in what terms the authority was given, or he may set up a custom under which a widow can adopt without such authority. He may similarly set up any custom to justify the adoption of a person of otherwise prohibited relationship or the adoption of a grown-up man. Whenever any such custom at variance with the ordinary Hindu Law is alleged by the defendant, particulars of it should be set out, e.g., whether the custom is local or communal, and what are the terms and incidents of the custom (*Laubmi v. Sangram*, 15 I. C. 322, 10 A. L. J. 136), and a plea of one particular custom cannot be altered into that of another during the progress of the suit (*Suraj Bali v. Tilok Chand* 36 I. C. 66,

No. 249—Suit by a reversioner for possession of property against transferee of a widow (c)

1. The plaintiff is, and one Ramkishan was, a Hindu governed by the Mitakshara law of the Benares school.

2. The plaintiff is related to Ramkishan as shown by the pedigree given below—



3 O. L. J. (327). If the plaintiff is the adoptive father, the defendant may plead an estoppel by showing that circumstances have arisen in which the likelihood of hardship to be caused to him by upsetting the adoption on which all parties have acted for a long time is so great that it will be inequitable and unjust to allow the plaintiff to bring the suit. In such a case it is not necessary for the defendant to prove that he was actually damnified by the plaintiff resiling from the story of adoption but it would be enough if he proves the likelihood of his being prejudiced by the alteration of position (*Josyam v. Josyam*, 103 I. C. 855). In such a case all the circumstances should be fully alleged. In such a suit onus lies on the plaintiff to prove that the adoption never in fact took place, or that the adoption was invalid.

(c) The Hindu Succession Act (30 of 1956) has revolutionized the Hindu law. It makes a female Hindu the absolute owner of the property possessed by her, whether it was acquired before or after the commencement of the Act. A reversioner cannot now avoid, on the mere ground of the absence of legal necessity, the alienations made by widows after the commencement of the Act. He will have also to allege that the property had been acquired by the widow by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award and the terms of the said gifts, will or other instrument or the decree or order or the award gave her a life estate only. This has been affirmed by the S. C. in the case of *Mst. Karmi v. Amru & others* A. I. R. 1971 S. C. 745.

The Act came into force on June 17, 1956. As a widow becomes full owner under the Act she can alienate as she likes but alienations made by widow prior to the commencement of the Act will be governed by the old Law and can be challenged by the reversioners. This has

3. The said Ramkishan was owner of the property mentioned at the foot of the plaint.

4. On the death of the said Ramkishan, Smti. Piari entered into possession of the property as his widow. (If the widow died on or after 17-6-56 say that after the death of said Ram Kishan, Smti. Piari entered into possession of his estate under a gift or a will or any other instrument, or under the decree or order of a Civil Court or under an award and the terms of the said gift, will or other instrument or the decree or order or award gave her a life estate only).

now been authoritatively laid down by the Supreme Court *Roopa Ram Bhargava v. Hanuman Pd. Bhargava* A. I. R. 1966 S. C. P. 216.

For the effect of Sec. 14 (i) or 14 (2) of Hindu Succession Act, on the right of a widow, who succeeded to her husband's estate prior to June 17, 1956, see the cases of A. I. R. 1959 S. C. 577; A. I. R. 1962 S. C. 1493, A. I. R. 1968 S. C. 365 & A. I. R. 1970 S. C. 1966.

In such a suit the plaintiff must allege his title to the property and the defendant's possession under the transfer from the Hindu widow. It is always proper in cases governed by Hindu Law to state by what branch of that law the parties are governed and then other inferences of law, e.g., that the widow's interest was limited to her life or was an absolute interest, need not be alleged as the court will presume them.

Such a suit can be brought after the widow's death. It cannot be brought in the life-time of the widow even on the ground that the widow has surrendered her estate to the reversioner, as the alienee is entitled to remain in possession for the life of the widow (*Venka Ramayya v. Venka Narayaa*, 100 I. C. 639 Mad; *Lachmi Chand v. Lachho*, 100 I. C. 764, 25 A. L. J. 161, 49 A. 334, 1927 (All.) 258).

A reversioner who consents to an alienation by a Hindu widow or other limited heir even though made without legal necessity is precluded from disputing the validity of the alienation. A person who joins in the transfer must be deemed to have represented that all those facts existed which authorise the making of the transfer. Such a person is estopped from challenging the transfer on the ground that those facts did not exist. But where the transferee knows the true position and cannot be said to have acted to his detriment upon the representation made, he is not entitled to rely upon the doctrine of estoppel (*Jhilatau Singh v. Jadu Nath Singh*, 1951 A. W. R. (H. C.) 101.,

A party dealing with a Hindu widow or other limited owner and advancing money to such limited owner so as to bind the estate in the hands of such owner must take particular care to see that his dealing could be supported even if they happen to be impeached after a length of time. The alienee or transferee is bound to secure the necessary evidence even at the inception so that he may be in a position to defend

5. The said Smt. Piari sold the said property to the defendant without any legal necessity on 20th August, 1941 and the defendant is in possession of the said property since that date.

6. Smti. Piari died on August 10, 1954.

7. All the persons mentioned in the above pedigree except the plaintiff had died before the death of Smti. Piari,

his title at the time, an attack is made long afterwards, after the death of the widow by the then reversioner (*Thampuranthozha Illai v. Thiruvavakarasu Bandaram*, 5 D. L. R. (T. C.) 507).

In such a suit if the defendant has erected buildings on the land transferred to him the plaintiff may ignore the building in his claim and pay court fees on the value of land only (*Durga v. Nibal*, 110 I. C. 319, 1928 (Lah.) 852).

The plaintiff some times offers in the plaint to pay as much as is found to have been taken for legal necessity, but such offer is not necessary, as the court can always give such relief.

Mesne profits : Such a transfer is not void *ab initio* but only voidable (*Jugalkishore v. Charoo Chandra*, 181 I. C. 341, 1939 (P.C.) 159, 1939 A. W. R. (P. C.), 1939 M. W. N. 963). Therefore mesne profits can be claimed only from the date on which it is impeached. The plaintiff should, therefore, specify that date. It can be impeached by an oral demand for possession, which, if refused, converts the possession of the alienee into that of a trespasser, or by an attempt to take possession forcibly (*Sitaram v. Maroti*, 103 I. C. 259). If it is not impeached before suit, it will be considered to be impeached when the suit is filed and mesne profits can be claimed only after that date (*Bhirgu v. Narshing*, 14 A. L. J. 1161; *Mohan Lal Khub Chand v. Jaifiwala Anandram*, I. L. R. 1938 (Bom.) 292, 40 Bom. L. R. 394, 1938 (Bom.) 298, 175 I. C. 76).

Limitation : Twelve years from the widow's death (Art.65). Adverse possession against the widow is not effective against the reversioner (*Kali Pratap v. Amla Pat*, 120 I. C. 447 *Contra Radha Krishan v. Nil Kamal*, 51 C. L. J. 23). For mesne profits only three years under Art. 113.

Defence : The defendant may deny the pedigree, or set up a nearer heir, or may plead that the widow's right was absolute and not limited for life (e. g., under a custom or under a transfer by the husband), or that the transfer was justified by legal necessity. Where necessity is shown, lender is not bound to ascertain how it was brought out (*Rajeshwar Bali v. Har Kridbna Lal*, 10 O. W. N. 147, 1933 (Oudh) 170). The particulars of the necessity for which the transfer was made should be set out in the written statement. If the alienation was made after the commencement of the Hindu Succession Act defendant can contend that the widow had become absolute owner and therefore the reversioner has no interest in the property.

and the plaintiff therefore became the heir of the said Ram-Kishan on the death of the said Smti. Piari.

8. On June 20, 1955 the plaintiff sent a registered notice to the defendant impeaching the said transfer and demanding delivery of the said property to him.

Consent of the person who was the next reversioner at the time affords a good presumptive proof of necessity, and the transferee may rely on it without giving evidence *aliunde* of the legal necessity or of his honest belief in the necessity. He will succeed if the presumption raised by the consent is not rebutted by the plaintiff by contrary proof of the absence of necessity (*Rangasami v. Nachiappa*, 42 M. 523 (P. C.); *Inderjit v. Jaddu*, 1933 A. L. J. 42 1933 (All.) 169, 149 I. C. 108; *Debi Prasad v. Golap Bhagat*, 40 C. 721). But if there were several reversioners at the time of transfer, the consent should be of all and not that of some of them only (*Yeshwantrao v. Tulsibai*, 99 I.C. 835 Nag.). If a transfer, was unjustified (as a dedication of 3/4th of the property to a deity), the consent of reversioners cannot make it valid. Even the consenting reversioners can impugn it, as consent only amounts to an agreement not to question which being without consideration is void. (*Debi Dayal v. Shri Radha Krishna*, 180 I. C. 880, 1939 (Oudh) 145). But the Privy Council has held that if the circumstances are such that the consent amounts to estoppel, the reversioners will be estopped, e. g., when he was himself a party to the alienation and had received benefit under it. (*Ramgowda v. Bhau Sabib*, 32 C. W. N. 88, 105 I. C. 708, 1927 (P. C.) 227, 53 M. L. J. 350, 46 C. L. J. 267, 4 O. W. N. 876, 1927 M. W. N. 736, 29 Bom. L. R. 1380), but the reversioner can challenge the alienation if he can prove that his consent was obtained by a false representation as to the existence of necessity. (*Harendra Nath v. Hari Pada*, 182 I. C. 852 1939 (Cal.) 387). But mere attestation by a reversioner is no presumptive proof in the absence of recitals of necessity (*Satya Narain v. Vaikama*, 145 I. C. 862, 1933 M. W. N. 1301, 1933 (Mad.) 637). The consent of a presumptive reversioner will however, not be binding on one who later becomes the actual reversioner (*Kalishanker v. Dhirendra Nath*, 1954 s. c. 505).

The defendant may show that the transfer in dispute was made with the consent of the plaintiff, as in that case, even if it was without legal necessity, the plaintiff cannot impeach it by reason of his having elected to treat it as valid (*Akawwa v. Sayadkhan Mithakhan*, 51 B. 475, 102 I. C. 232, 29 Bom. L. R. 386, 1927 (Bom.) 260; *Fateh Singh v. Rukmani*, 1923 All. 387, 45 A. 339, 72 I. C. 8, 21 A. L. J. 235). The Supreme Court in *Jaisri Sahu v. Rajdewan Dube*, (1962 S. P. 83) held that the widow as owner has the fullest discretion to decide what form the alienation should assume if there is necessity for transfer. A sale to pay off a usufructuary mortgagee who has no right to sue for his money was on that ground held valid. The defendant can rely on this principle also.

Partial Justification : There was some divergence of opinion between the Allahabad High Court and other High Courts as to the con-

The plaintiff claims—

- (1) Possession of the said property.
- (2) Rs. 1,000 on account of one year's mesne profits from June 20, 1955 to the date of suit with interest, and future mesne profits until the date of delivery of possession.

No. 250—Suit by a reversioner for declaration that a Hindu widow's transfer is not binding (d)

1. One Ramkishan was a Hindu governed by the Mitakshara law of the Benares school.

sequence of a transfer, a portion of the consideration of which is, and the other is not, justified by legal necessity. This conflict was set at rest by the P. C. in *Sri Krishandas v. Nathu Ram*, 25 A. L. J. 80, 100 I. C. 130, 1927 (P. C.) 37, (1927) M. W. N. 89, 38 M. L. T. 48, 4 O. W. N. 184, in which the principle laid down by the other High Courts was approved. It was laid down that the true question to be answered in such cases is whether the sale itself was one which was justified by necessity. If the vendee had made enquiries and found that there was necessity for the sale, he is not bound to show the application of the whole consideration money to the said necessity. If the application of the bulk of the proceeds of the sale are accounted for, the fact that a small part is not accounted for will not invalidate the sale, but in such cases transferee can be ordered to pay the money not accounted for (*Inderjit v. Jaddu*, 144 I. C. 108, 1933 A. L. J. 42; *Subramanya v. Kupuswami* 1933 M. W. N. 152; *Ishwardevi v. Jagannath*, 1940 A. L. J. 15). This does not mean that the sale will be invalidated whenever the part of the consideration not accounted for cannot be described as small. If the sale is justified by legal necessity it will stand. (See also *Srinath v. Jagannath*, 1930 (All.) 292). In a case where it was found that half of the total consideration was for binding purposes, the purchaser was allowed to retain half the property for the entire consideration (*Mahalakshmi v. Tirupurasundarama*, 133 I. C. 198, 62 M. L. J. 478, 1931 (Mad.) 53). This principle does not, however, apply to a mortgage which is good only to the extent of necessity proved (*Shidaya v. Basaprap happa*, 183 I.C. 568, 1939 (Bom.) 301, *Purushottam v. Gangadhar*, 1939 (Bom.) 445).

(d) After the commencement of the Hindu Succession Act such a suit is not maintainable merely on the ground of the absence of legal necessity. Allegations contained in para. 3 will have also to be made besides raising the plea of absence of legal necessity. Such a suit can be brought only by a reversioner and not by a stranger as the alienation is not void but voidable at the instance of the reversioner (*Mst. Kishori Kunwar v. Parmeshwar*, 1948 Pat. 457). A reversioner is not bound to institute such a suit. The object of such a suit is to secure a declaration to be of help to the reversioners after the death of the widow, as otherwise evidence regarding the true character of the aliena-

2. The said Ramkishan was owner of the property detailed at the foot of the plaint.

3. The said Ramkishan died in 1920, and on his death, defendant No. 1 entered into possession as his widow under a will or gift or any other instrument or under a decree or order of a Civil Court or under an award and the terms of the said will or gift or other instrument or the decree or order or award gave her a life estate only.

tion might disappear (*Dula v. Bai Jivi*, 39 Bom. L. R. 1072, 1938 (Bom.) 37, 174 I. C. 24). Such a suit is brought on behalf of the entire body of reversioners or the person who would be the actual reversioner on the death of the widow, and no suit for the benefit of the plaintiff alone can be maintainable (*Bansidhar v. Dulhatia*, 23 A. L. J. 329). Therefore on the death of the plaintiff the other reversioners and not his personal heirs should be substituted (*Rameshwar v. Ganpati Devi*, 1936 (Lah.) 652). The prayer should, therefore, be not (as is common) a declaration that the transfer would be null and void against the plaintiff but that it would be null and void after the death of the widow, or against the reversioners of so and so. The result of such a suit would, be binding on the whole body of reversions on the death of the widow (*Kuar Mata Pd. v. Kuar Nageshar Sahai*, 1925 (p. c.) 272), whether anyone was or was not in existence at the time the decree was obtained (*Narain v. Waryam*, 1928 (Lah.) 545, 111 I. C. 139), unless the suit is proved to have been collusive (*Gadhu Singh v. Bansgopal*, 1929 (All.) 859). Such suits have now become common, and sometimes when a suit is brought for possession on the death of the widow a long time after the alienation, courts are prepared to accept slight evidence of the legal necessity and comment on the plaintiffs not having sued for declaration at a time when full evidence was available.

The plaintiff must show that he is the next reversioner, i. e., if the widow died immediately he would succeed to the property. He has to establish the relationship and to satisfy the court that to the best of his knowledge there are no nearer heirs (*Javitri v. Gendansingh*, 102 I. C. 167 A. *Sarfaraaz v. Mt. Rajana*, 112 I. C. 834, 1929 (Oudh) 129, 4 Luck. 19). It is not necessary that the plaintiff should be reversioner to the full proprietary interest but even a reversioner who will take only for life, e.g., a daughter, can sue (*Matru Mal v. Mehri*, 1940 (All.) 311, 189 I. C. 600). Even a remote reversioner can sue (1) where the nearest reversioner is a female (*Raja Dei v. Umed Singh*, 34 A. 207, 13 I. C. 632, 9 A. L. J. 158; *Ramyad v. Ram Bihara*, 4 P. L. J. 734, 54 I. C. 357 or (2) where the next reversioner refuse without sufficient cause to use or has colluded with the limited heir, or has concurred in the alienation (*Avola v. Avola*, 18 I. C. 212 M., *Bakhtawar v. Bhagwan*, 32 A. 176; *Satindra v. Sarola*, 27 C. L. J. 320 45 I. C. 59; *Somnath v. Laxman*, 1962 Orissa 38), or (3) when he is himself the transferee but in all such cases, the plaintiff must state such exceptional circumstances giving him a right to sue (*Musammam Viranwali v. Kundal Lal*, 9 Lah. 106). If

4. The plaintiff is related to the said Ramkishan as per pedigree given below :

Pedigree

* * * * *

he does not, but sues merely as a next reversioner he cannot, on being found not to be the nearest reversioner, plead that he had brought the suit because the nearest reversioner had refused to bring the suit or had precluded himself from bringing it (*Sita Ram v. Jagat*, 102 I. C. 296 A ; *Lalta Prasad v. Dwarka*, 195 I. C. 492, 1941 (All.) 313). But the Allahabad High Court has ruled that a remote reversioner cannot sue merely because the next reversioner is a female, but he can be allowed to sue if there are special circumstances, for example collusion, concurrence or refusal of the next reversioner (*Deoki v. Jwala Prasad*, 26 A. L. J. 449. It is proper in such cases to implead the next reversioner as a *pro forma* defendant, though there is no defect if he is not impleaded (*Deoki v. Jwala Pd. supra*). If the nearest reversioner is a minor, a remote reversioner cannot bring a suit except in the minor's name as his next friend (*Kali Charan v. Baghera*, 23 A. L. J. 653, 1925 (All.) 585. *contra*, *Khanqah v. Pira*, 111 I. C. 247, 1928 (Lah.) 6. *Melaram v. Mt. Bhagi*, 1946 (Lah.) 1).

The plaintiff should next allege facts showing that the transferor has only a life estate in the property and that she has made transfer extending beyond her life, and that without any legal necessity. The prayer should be for a declaration that the alienation would be void against the reversionary heir after the death of the limited owner. One should be careful not to sue for a declaration that it is immediately void, for such a declaration cannot be given, nor can a declaration of the plaintiff's reversionary rights to inherit the property be claimed (*Mannumal v. Raja Ram*, 20 A. L. J. 282; *Janki Ammal v. Narayanasami*, 31 M. L. J. 225, 14 A. L. J. 997, 24 C. L. J. 309, 37 I. C. 161). There is only one cause of action for the whole body of reversioners in respect of their right to challenge an alienation by a limited owner and if such a suit is not brought within the period of limitation prescribed by Art. 120 or 125, Limitation Act, the whole body of reversioners existing or subsequently born are debarred from suing. (*Dehai Mahton v. Moti Mohton*, 19 P. L. T. 145, 1938 (Pat.) 510, 178 I. C. 643 (now Arts. 113 or 108).

The consent of a reversionary heir to an alienation made by a Hindu limited owner upon the ostensible ground of legal necessity raises a presumption of legal necessity for such alienation although the reversioner received a substantial benefit under the transaction.

The above presumption of legal necessity applied to the kind of transaction which was actually entered into by the limited owner. Where it was one of the conditions of the transaction that the money which was said to be due to a certain person was to be retained by the purchaser in his hands for payment to that person and the reversioner

5. All the persons mentioned in the said pedigree of a degree higher than the plaintiff are dead, and the plaintiff is therefore the nearest reversionary heir of the said Ramkishan.

(Or, all the persons mentioned in the said pedigree higher than the plaintiff are dead, except Ram Bihari who

knew of this and yet assented to it, it must be held that every step taken by the limited owner was regarded by him as an appropriate one, and therefore, the presumption of legal necessity would still operate even though the money was retained by the purchaser in his hands and even though he has not established that he actually discharged the liability. (*Vishnoodhar Wemdhari v. Bishnoo Prasad*, A. I. R. 1951 Nag. 390).

In the case of an alienation by a Hindu widow, the alinee is *prima facie* bound to make out facts which authorise the alienation. This burden will be deemed to be discharged when there has been a failure on the part of a reversioner to challenge the alienation within a reasonable time such failure being deemed to be acquiescence on his part. There can obviously be no such failure when the reversioner entitled to challenge it could not challenge it and there is good explanation for his doing so e.g., where the reversioner came to know of this alienation long after a suit by him for a declaration that the alienation is not binding on him became barred by limitation. Surely no presumption of acquiescence can be raised in such a case, acquiescence implies knowledge of a right and a conscious refusal to assert or exercise such right when it was capable of being asserted or exercised (*Sayankabai v. Supadaji*, A. I. R. 1951 Nag. 462).

In a suit for declaration that two sale-deeds executed by a widow, covering the whole property were not binding on the reversioners instituted by the daughter's sons of the last male-holder, it was found by both the Courts below that there was no proof that the first sale for Rs. 100 was for her maintenance and that the second sale for Rs. 500 was for an inadequate consideration and the ostensible purpose being to meet the expenses of a trip to Gaya to perform Sradh when she had already done it once before was not for legal necessity. The single Judge having confirmed the decree of the courts below a Letters Patent Appeal was preferred.

Held : According to Hindu law a widow is certainly under an obligation to perform 'Sradh' at Gaya for the salvation of her husband's soul; but having performed once such a pilgrimage a second pilgrimage to Gaya for the same purpose is only a religious act conducive to the spiritual welfare of her husband. It is not essential or obligatory. For such an act the widow is not empowered to sell the whole estate but only a small fraction thereof. The sale of the entire property is not justified by legal necessity. (*Gur Prasad v. Ram Sukh*, A. I. R. 1952 A. 938).

is colluding with the defendants and does not challenge the transfer hereinafter mentioned).

6. The defendant No. 1 has sold the said property to defendant No. 2 without any legal necessity on 20th

For religious purposes which only conduce to the spiritual welfare of her deceased husband and are not obligatory, the widow can alienate only a reasonable part of the property. (*Ghasnin v. Kaushilya*, 1961 M.P. L. J. 733).

A reversioner under Hindu Law, is entitled to challenge the alienation of the widow quite irrespective of whether the property in suit is ancestral in relation to him. Therefore in a case in which the parties by consent have stated that they are governed by Hindu Law and not the Punjab Customary Law it is unnecessary to decide the nature of the property. (*Brikmu v. Jodha*, A. I. R. 1953 H. P. 73).

In deciding whether an alienation by way of sale by a Hindu widow is binding on her husband's reversioners, the real question to be considered is whether the sale itself is justified by necessity. If the purchaser has acted honestly and after making reasonable inquiries has satisfied himself *bona fide* as to the existence of necessity, he is not bound to see to or account for the application of the sale price paid by him. But though generally the question whether the sale is justified by necessity is not one of arithmetical calculation only, yet in a case where it has not been shown that it was necessary for the widow to sell the property to discharge any debt, alleged to be binding, and the finding is to the effect that the purchaser made no *bona fide* inquiry and was not acting as an honest purchaser, there is no room for applying the principle of acting on the faith or belief of a reasonably accredited necessity. The purchaser cannot claim protection and the alienation cannot bind the reversioners. (*Bhagwati Charan v. R. Hirduy Singh*, A. I. R. 1952 Pat. 160).

A Hindu widow cannot alienate for the payment of her husband's debts the whole of her husband's estate by way of sale, irrespective of other considerations like the value of the property relatively to the amount of debt to be repaid and whether that debt could have been repaid by making a lease or a mortgage, that is to say, creating a limited transfer instead of making an out and out sale. (*Wamanrao v. Shantabai*, A. I. R. 1952 Nag. 317; *Jaisri Sahu v. Rajdevan Dube*, 1962 S. C. 83).

In a suit by a reversioner for a declaration that a sale by the widow was without legal necessity and was not binding on the reversioner if the sale is found to be justified by legal necessity to a certain extent the proper decree to pass in such a case would be to create a charge on the subject matter of the sale for the portion of the sale consideration found to be justified by legal necessity. (*Japhu v. Parshuttam Ram*, A. I. R. 1953 H. P. 84).

In every case the Court has to exercise a judicial discretion in determining whether the remote reversioner is entitled to sue without impleading the nearer reversioner. The question to be considered in such a case

August 1940, and put the defendant No. 2 in possession of the said property.

The plaintiff claims a declaration that the said sale would be null and void after the death of defendant No. 1

is whether on account of the non-joinder of the nearest reversioner there is likelihood of any prejudice being caused to her. If a relief can be granted which benefits her and benefits the estate to which she is the presumptive reversioner it cannot be urged that on account of her non-joinder the suit should fail. (*Sheodutta Kedia v. Akali Bhumijani*, 1953 B. L. J. R. 384).

Where a Hindu widow who has succeeded to her husband's property embraces a civil death by her remarriage, the next reversioner succeeds to the estate and is entitled to enforce an actionable claim in respect of land granted by widow on bhag cultivation. No question of transfer of an actionable claim by written instrument as contemplated by section 130, T. P. Act, can arise in such case, (*Hari Mohato v. Jugal Mahato*, 1953, B. L. J. R. 389).

The consent of a female reversioner to an alienation made by a limited owner is presumptive proof of legal necessity for the same. there is no authority for making a distinction between the consent of a male reversioner and that of a female reversioner. (*Krishana Behera v. Fakir Mahakud*, I. L. R. 1953 Cal. 300).

In the eye of the law failure by an alienee from a Hindu father to make such enquiries as a prudent purchaser would make is practically equivalent to bad faith. A complete want or absence of inquiry would amount to bad faith so as to deprive him of the protection given to a purchaser in good faith. (*W. S. Nene v. Mahadeo Vishnu*, A. I. R. 1952 V. P. 20).

The mere fact that the alienor (Hindu father) was in poor circumstances would not justify a court in coming to the conclusion that the purchase money or any part of it must have been applied for household expenses or otherwise for purposes of the joint family in the absence of any substantive evidence to that effect or of any evidence of inquiry in that direction (*Manohar Naik v. Braja Mohan Bhoi*, A. I. R. 1952 Orissa 239).

Where several invalid transfers are made, a reversioner cannot be compelled to sue in respect of all, but if there are several claims on the same property and reversioner tries to dispel only one allowing another equally dangerous to stand, declaration should not be granted (*Kanai Singh v. Lakshmi*, 1943 (All.) 111).

Limitation : Twelve years from date of alienation (Art. 108). When a minor widow's guardian made a mortgage and the widow on coming of age renewed it by executing another mortgage deed, it was held that the reversioner's suit brought more than 12 years after the former mortgage was time-barred, though filed within 12 years of the latter (*Adeyya v. Govinda*, 58 M. L. J. 417).

(Or, would not be binding on the reversioners of Ramkishan after the death of defendant No. 1).

No. 251—Suit by a reversioner to restrain waste by a Hindu widow (e)

Paras 1-5. (As in the last precedent, except that “defendant” should be substituted for “defendant No. 1.”).

6. The defendant is mismanaging the said property and is deliberately committing waste thereof to injure the plaintiffs reversionary rights, and threatens and intends, unless restrained from doing so, to dissipate the whole property, so that nothing, or a very small portion of it, may be left after her death.

Particulars of waste

(i) In the month of October, 1924, the defendant lent certain valuable silverware and carpets of the estate of her husband to her brother's son Ramadhin on the occasion of the marriage of the latter's daughter. The said Ramadhin never returned them and the defendant has taken no steps to recover them.

(ii) In November, 1924, the defendant has, in consideration of money taken by her from Ajudhia, Ramo, Khuda Buksh and Seva, tenants of village Islamnagar, forming part of her husband's estate, withdrawn her suits for ejectment which she had filed in the twelfth year of their tenancy, and thus the said tenants have acquired occupancy rights.

Defence : Same as in a suit for possession on the death of the widow.

Court Fees : This is a suit for declaration without a consequential relief and the fixed court-fee prescribed by Art. 17 is payable. If there are several alienations a separate fee is payable about each (*Hari Krishna v. Sunamani Dei*, 186 I.C. 877, 1940 (Pat.) 158). Even if a prayer for injunction is added, the suit remains one for pure declaration as injunction cannot be granted (*ibid*).

(e) No such suit lies if the widow has become an absolute owner under Section 14(1) of the Hindu Succession Act. A suit will, however, lie if the widow's status is that of a limited owner on the allegations

(iii) In December, 1924, the defendant has cut down 20 green and useful trees from the grove of her husband Islamnagar and converted them into money.

(iv) In January, 1925, in consideration of substantial cash payments, the defendant has given permission to one Sridhar to dig *Kankar* in the whole land of village Shampur forming part of her husband's estate, thereby rendering the land unfit for cultivation.

(v) In the rains of the last week of January, a portion of the roof of the house of Ramkishan in mohalla Ramapura had fallen down, and, instead of repairing the same, defendant pulled down the house and sold the materials, and appropriated the price thereof.

Particulars of mismanagement

(In addition to the above acts).

(i) The defendant has dismissed, without any sufficient reason, Babu Ram Pratap who had very creditably managed the property in the lifetime of her deceased husband, and has appointed one Rahim Baksh as the manager.

(ii) The said Rahim Baksh has granted long leases on very small rents to Bulla, Abdulla, Nisar and Mushtaq, and has taken Rs. 150 from Bulla, Rs. 80 from Abdulla, and substantial but unknown sums from Nisar and Mushtaq as premiums.

made in para. 3 of the preceding Precedent. After showing his right as a reversioner and the defendant's right as a limited owner the plaintiff must go on to allege that the woman is committing waste of the property. The Court will not issue an injunction unless a very clear case of real danger to the *corpus* of the property is made out, (*Sarajnarin v. Ramdevi*, 179 I. C. 447, 1939 (Oudh) 78), and instances of waste must be set forth in the plaint. Mere alienation is not waste and no suit to restrain the widow from alienating the property can lie (*Renka v. Bhola-nath*, 28 I. C. 896, 37 A. 177; *Dhup Rani v. Chail Bihari*, 5 O. W. N. 556, 111 I. C. 248). The plaintiff may pray for an injunction to restrain her from committing waste, or if there is a strong case of mismanagement, for her removal from the management of the property and for the appointment of a receiver (*Tanikachala v. Alamebelu*, 25 I. C. 153 M.), but this is done only in very rare cases.

(iii) Since his appointment, the said Rahim Baksh has not sued for the ejectment of any tenant in village Rasulpur, and Ramlal, Jabbar, Sattar and Saqi, tenants, have consequently acquired occupancy rights.

The plaintiff claims—

(1) An injunction to restrain the defendant from committing any act of waste in respect of the said property.

(2) Appointment of a receiver.

No. 252—Suit for setting aside alienation made by a Hindu father (f)

1. The plaintiffs are sons of defendant No. 2, and are, and have always been, members of a joint Hindu family with him. The said family is governed by the Mitakshara law of the Benares school.

2. The property mentioned at the foot of the plaint is the joint family property of the plaintiffs and defendant No. 2.

3. By a hypothecation deed, dated November 20, 1920 the said defendant No. 2 mortgaged the said property to defendant No. 1.

Limitation : Three years from the time when the waste begins. Under Art. 89, Sec. 22 will not apply though the waste is continuing wrong, as time under the article runs from the beginning of the waste (*Dhanjiboy v. Hirabai*, 25 B. 644).

Defence : Besides pleading that the plaintiff is not the reversionary heir, or that the defendant's right is not a limited one, the defendant may deny that she is committing waste, and may explain away the instances alleged by the plaintiff.

(f) An alienation made by one member without the consent of the other members of a joint Hindu family governed by the Mitakshara law as prevalent in Bengal and Benares is altogether invalid while in Bombay, Madras and M. P. it is valid to the extent of the transferor's share (*Babu Singh v. Lal Kr.*, 1933 A. L. J. 1547, 1933 (All.) 830; *Mt. Maneswati v. Jugal Mohini*, 4 D. L. R. (Cal. 1) T. R. *Rajagopala v. D. Anjaneya*, 1943 (Mad.) 558; *Chanbasayya v. Basayya*, 1961 Mys. 191; *Jinwarsa v. Gunwant*, 160 I. C. 196, 1936 (Nag.) 34). The Madras High Court is of the view that while a coparcener can alienate his own undivided share for a consideration he cannot make a gift or devise of it and such a transaction is void (*Kulasekhara Perumal v. Pathakutty*, 1961 Mad.

4. The mortgage was made without a legal necessity, or, at any rate, there was no legal necessity to borrow money at such a high rate of interest.

(Or, the plaintiff does not admit the existence of the antecedent debts alleged in the mortgage-deed as being the consideration of the mortgage.

405) the alienee for consideration can sue for partition as he stands in the shoes of the alienating coparcener (*Sellammal v. Perimmal*, 1962 Mad. 144). According to the Assam High Court interpretation of the Benares School, a coparcener can alienate for value his undivided interest without the consent of his other coparceners, only for legal necessity or for payment of the fathers antecedent debts. The transfer is not void, but voidable at the instance of the non-alienating coparceners (*Ramprasad Karu v. Kripesh Kumar*, 1961 Assam 54. The transferor's son under the Bombay School, or subsequently adopted son cannot challenge it. (*Basawantappa v. Mallappa*, 182 I. C. 302, 1939 (Bom.) 178t). Under the orthodox Benaras School even the consent of the manager who is under disability cannot validate a transfer by a junior member (*Sarju Pd. v. Ram Saranlal*, 132 I. C. 568, 1931 A. L. J. 400, 1931 (All.) 541). The only exceptions to this general rule are the cases of father and manager. Both can alienate the family property for a legal family necessity, or to pay off antecedent debts but if the alienor is the manager, the antecedent debts must be proved to have been incurred for family necessity. This is not necessary in the case of a father (*Raja Bahadur v. Mangala Prasad*, 21 A. L. J. 934 (P. C.)). It has been held in Madras that even if no legal necessity is proved but the alienation was for the benefit of the estate it will be upheld (*Iyer A. T. Vasudevan*, 1949 Mad. 260, 1948-2 M. L. J. 47).

It seems, however, to follow from the dicta in some of the Privy Council cases and the original text of the Mitakshara (para. 28) that one member can transfer his share in season of distress, or for the sake of the family or for spiritual purposes. It has been held by the Patna High Court that a junior member can transfer the family property and incur debts binding on it in times of distress and family necessity. (*Dhanukdhari v. Rambirich*, 70 I. C. 391, 1 Pat. 171, 1922 (Pat.) 553). In two cases that High Court went still further and without insisting on the condition of "distress" held that a member can borrow money on the security of family property or can alienate it for a family necessity, just like a manager (*Inder chand v. Bidya dhar*, 60 I. C. 282, 1921 (Pat.) 107; *Ramdas v. Tanak Singh*, 111 I. C. 51, 1928 Pat. 557). It has further been held by that court that a mortgage by one member of his individual share in joint property is not *ab initio* invalid and therefore it attaches to the share which he gets on partition (*Kharag Narain v. Janki Rai*, 169 I. C. 906, 1957 (Pat.) 546).

Such an alienation is not *ab initio* void, but is voidable at the instance of the persons affected by it (*Jageshar v. Deo Dat*, 21 A. L. J.

Or, the antecedent debts, alleged to be the consideration of the mortgage, were incurred for the purpose of gambling at *Diwali* of 1978 *Samvat*.)

(If necessary, add,—5. Though the plaintiffs were born after the date of the said transfer, yet their elder brothers Ramlal and Kishanlal were in existence when the said mort-

608, 45 A. 654; *Ram Kumar v. Mohanlal*, 1940 (Pat.) 270, 185 I. C. 788; *Ram Prasad Karu v. Kripesh Kumar*, 1961 Assam 54; contra *Kashinath v. Bapu Rao*, 1940 (Nag.) 305). Therefore a member of the joint family who did not join in, or consent to, the alienation can sue to have it set aside. A person who was not in existence or even in his mother's womb at the time of the alienation cannot question it after his birth (*Tulsi v. Babu*, 8 A. L. J. 733; *Deo Narain v. Ganga*, 13 A. L. J. 69; *Daulat Kuer v. Ramdas*, 1940 (All.) 349, 189 I. C. 712, 1940 A. L. J. 366). If the transfer was not made with the consent of other members then in existence, even an afterborn son can impugn it (*Tulsi v. Babu*, 8 A. L. J. 733; *Surajpal v. Panchaiti etc.*, 183 I.C. 270, 1939 (All.) 486; *Bhagwat Pd. v. Dehi Chand*, 20 Pat. 727; Contra *Adapa v. Vernalepatti*, 1944 (Mad.) 33). But if there is a person in existence at the time of alienation who is competent to challenge the alienation, an afterborn reversioner can challenge it, but he cannot avail of any extension of limitation on his account as time begins to run against all persons competent to challenge it from the date of alienation, though he can avail of any extension which could be allowed to the reversioner in existence (*Gobind v. Ram Lal*, 1937 (Lah.) 420). If the reversioner in existence fails to challenge it within limitation another reversioner who was minor at the time cannot claim extension of time on account of his minority (*Matu v. Jati*, 170 I.C. 541, 1937 (Lah.) 485). The P. C. has held that if the child who objects to the alienations is conceived after the alienation but during the life of a child conceived before the alienation, then that overlapping of the two lives enables the later born son to contest the alienation (*Shri 108 Pujapad v. Surajpal*, 1945 (P. C.) 1).

In Madras and Bombay, the plaintiff may make an alternative prayer that if the transfer be held to be valid to the extent of the father's share—a decree for possession of his share only may be passed. In that case, defendant may sue for general partition so that both the suits may be tried together and the transferred property may be allotted to him in lieu of the father's share but the son's suit cannot be converted into one for partition. (For full discussion of this matter and the form of decree in such cases, see *Kundaswami v. Velayutha*, 96 I. C. 993, 51 M. L. J. 99, 1926 (Mad.) 744).

In a suit to contest the alienation, the plaintiff should allege (1) that he is a member of a joint Hindu family, (2) that he has an interest in the property alienated (for he has no right to attack a sale of self-acquired property of a transferor), (3) the particulars of the alienation, and (4) facts showing its invalidity.

gage was made and they did not consent to the said mortgage).

The plaintiff claims a declaration that the said mortgage is null and void.

No. 253—Suit for possession of family property sold in execution of a mortgage decree

Paras 1-3 (as in the last precedent, except that in para 2, "is" should be substituted for "was").

The last item requires some explanation. Ordinarily, a plaintiff, impeaching the alienation either by a suit for declaration of its invalidity, as in the case of a simple mortgage, or in a suit for recovery of possession, as in case of a sale or usufructuary mortgage, must allege that the transfer was made without a legal necessity. If it purports to have been made by the father for an alleged antecedent debt, the plaintiff may simply deny the existence of such debt, or may impeach it on the ground of immorality or illegality. For a clear and concise statement of the law relating to the liability of the son's share of the joint family property for the debts of the father see *Panna Lal v. Mst. Naraini*, 1952 S. C. 170 and *Viridhe Chalam v. Chaldean Bank*, 1964 S. C. 1425. The burden of alleging and proving circumstances justifying the transfer will be on the transferee. Where however, the property has been sold in execution of a decree on a mortgage by the father and has thus passed out of the hands of the family, the plaintiff cannot succeed without proving that the debt for which the mortgage was made was an immoral or an illegal debt (*Jadubir v. Gajadhar*, 21 A. L. J. 809), and that the auction-purchaser, if he is a stranger, was aware of the fact (*Suraj Bansi v. Sheo-Prasad*, 5 C. 148 (P.C.)); *Sitla Prasad v. Chameli*, 21 A.L.J. 683; *Girdhari v. Kantu*, 1874 I. A. 321). In such cases it is not sufficient to allege mere want of legal necessity, but it should be definitely alleged that the debt was an immoral or an illegal one and that the purchaser knew it. It has been held in *Gauri Shanker v. Jang Bahadur*, 79 I. C. 1000; *Nand Lal v. Umrai*, 1926 (Oudh) 321 and *Jagirdar Singh v. Punjab and Sindh Bank*, 1939 Lah. 585 that, after a decree has been passed against the father on a mortgage made by him, the son cannot get the decree set aside without showing immorality or illegality of that debt. In some cases (*Jadish Prasad v. Hoshyar Singh* 26 A. L. J. 1289 (F. B.), *Ganpati v. Rameshwar* (1949) Nag. 649) the view taken was that in case of a mortgage decree the son's share could be exempted merely for want of legal necessity and proof of immorality or illegality was not necessary. This is no longer good law after the Supreme Court decision in *Faqir Chand Harnam Kaur* A. I. R. 1967 S. C. 727).

The Supreme Court approved the view in (*Hira Lal v. Panna Lal* 1949 II.) 685 (F. B.) where it was held that the word debt in the second preposition in *Brij Narain* case (1929 P. C. 50) (Viz. the father can by

4. The said property was sold in execution of a decree for sale obtained by the said defendant No. 1, against defendant No. 2 and has been purchased by defendant No. 3, who is in possession as such purchaser.

5. The plaintiffs were no parties to the said decree.

managing debt so long as it is not for immoral purposes lay the estate open to be taken in execution proceedings upon a decree for payment of the debt) covers both simple and mortgage debts. where the mortgage was by the manager however the plaintiff need not allege a prove illegality or immorality of the debt and will proceed unless legal necessity be shown. The question whether father's alienation can be impeached by son on the ground of inadequacy of consideration also is not free from controversy but in a recent full bench case the Allahabad High Court has held this can be done (*Dudhnath v. Satnarain Ram* A. I. R. 1966 All. 315). The sons while attacking the mortgage can attack the rate of interest also (*Nawab Nazeer Begum v. Rao Ragbunath* 17 A. L. J. 591, 36 M. L. J. 521, 30 X.C. L. J. 86). It is therefore better to take this ground also in the plaint in the alternative, if possible.

It is not sufficient to establish general immorality or extravagant life of the father but it must be proved that the particular debt was incurred for immoral or illegal purposes (*Shanti Sarup v. Jangiri*, 110 I. C. 273; *Tulsi Ram v. Bisnath*, 50 A. 1, 155 I. C. 885, 1927 (All.) 785; *Sri Narain v. Lala*, 17 C. W. N. 124, 17 I. C. 729 (P. C.)). General allegations of immorality of the father should not therefore be made in the plaint in support of the allegation of want of necessity. If the debt is alleged to be immoral, that fact may be definitely alleged and full particulars of the alleged immorality showing how the debt was connected with the acts of immorality must be given. It would not do merely to allege that the debt was taken for immoral purpose or for gambling (*Tulsi Ram v. Bisnath*, *ibid*). Unlike the other High Courts, the Madras High Court once held that it is not necessary to establish a direct connection between the debt and the purpose for which it was borrowed, but it is sufficient to show that the borrower was at the time leading a licentious life beyond his means and was without any business or occupation upon which the money could legitimately have been spent and that a loan contracted in the midst of such living and spent upon it would be a loan contracted for immoral purposes (*Guru Moorthi v. P. S. Subramanian*, 107 I. C. 401), but has in recent case, disapproved of this view and held that a bare averment that the father led an immoral life is not sufficient (*Venkayya v. Narsinghachari*, 1938 M. W. N. 742, (1938) 1 M. L. J. 33, 47 L. W. 463). It has been held in Nagpur that it should also be proved that the creditor knew that the money was borrowed for immoral purposes (*Shanker Rao v. Kamta Prasad*, 1947 (Nag. 129).

"Immoral" in this connection is not to be taken in a narrow sense, but if the action of the father which resulted in the debt was infected with an element of criminality, the debt is immoral e.g., in case of money

6. The mortgage of November 20, 1920, was made by defendant No. 2 in order to pay off his debts incurred in *babhani* or grain gambling transaction with the said defendant No. 1 in *Baisakh, Samvat 1957*, (or to raise money for drinking purposes, or for expenses incurred by the said defendant No. 2 in maintaining at Agra, a mistress, by name Smti. Putli.)

misappropriated by him. A transfer to pay up such money would be void (*Jagannath v. Jugal Kishore*, 23 A. L. J. 882, 89 I. C. 492). If there was no criminality, but only a civil liability, the debt cannot be said to be immoral. It has been held in *Rameshwar v. Durga*, 1926 (Pat.) 14, 7 P. L. T. 42, 90 I. C. 454, and *Anand Rao v. President*, 1940 (Mad.) 828, that where the taking of the money was not a criminal act, the subsequent appropriation of it will not make the liability immoral (*Sri Venkateswar Temple v. Radha Krishna*, 1963 A. P. 425 F. B.). The Supreme Court in *S. M. Jakati v. S. M. Borkar*, (1959 S. C. 282) held that "immoral" means repugnant to good morals and that the liability of a Hindu father who was a Managing Director of a Cooperative Bank, incurred as a result of negligence in the discharge of his duties was not an immoral debt.

An offer is sometimes made that if any portion of the consideration for the alienation is found to be binding, the plaintiff is ready to repay that amount. It is not strictly necessary to make this offer, for the Court can always grant whatever relief it thinks equitable and proper (*Ganakapati v. Ganakapati*, 37 M. 275, 17 I. C. 508). If any part of the consideration is found not to be binding, the transfer is generally set aside on plaintiff's paying back the amount (with interest, if necessary), but if this part is insignificant in comparison with that for which the necessity is proved, the transaction will be upheld. (*Vide* footnote (c) above). This rule does not however apply to mortgages as only so much money could be borrowed as was really needed (*Misrilal v. Bhawani Pd.*, 8 O. W. N. 1002, 134 I. C. 1089).

It has become a practice to allege in the plaints that the transferor was not competent to transfer the family property or the transfer is egally void and plaintiffs have a right to have it set aside, but all these bleing matters of law, should have no place in a pleading.

Mesne Profits : See note (c) above.

Limitation : Twelve years from the time when the transferee takes possession (Art. 109). If the suit is for mere declaration that the alienation is null and void, Art. 58 would apply (three years). If the plaintiff was a minor at the time of alienation, limitation is extended. If he was in his mother's womb at the time of alienation the extension of limitation claimable by a minor cannot be claimed by him (*Chuni Lal v. Altif-ul-Rahman*, 183 I. C. 451, 1939 (Lah.) 290); *Nandlal v. Deorao*, 1940 (Nag.) 94). So a suit by a subsequent born grandson to set aside grandfather's alienation was held to be governed by Article 144 (as Art.

7. The defendant No. 3 was, at the time of his auction-purchase of the said property, aware of the facts alleged in para. 6 above.

126 applied only in cases of father's alienations) and was held to be barred if filed more than 12 years after the date of alienation (*Jivan v. Venkatesh*, 1940 (Bom.) 136, 187 I. C. 663). Now under the Act of 1963, Arts. 65 and 109 will apply depending on the nature of suit.

Defence : In such cases the transferee may plead (i) that the plaintiff was born after the transfer and the transfer was made with the consent of the members then in existence; (ii) that the property was the self-acquired property of the transferor; or (iii) that the defendant had made inquiries into the necessity for the transfer and had advanced money because he was satisfied, as a result of such inquiries, that the money was needed for a family necessity (though the necessity is afterwards found not to have really existed as in such a case the alienee is not bound to see the application of the money (*Atma Ram v. Sadhu*, 1938 A. L. J. 190, 172 I. C. 1004, 1938 O. W. N. 196, 1958 (P. C.) 77, 40 (Bom.) L. R. 742, 40 P. L. R. 180); or (iv) that the transfer was justified by legal necessity; or (v) that the transfer was made in lieu of antecedent debts of the father or manager, in the latter case adding that the manager's debt was also taken for a family necessity. Pleas (iii) and (iv) may be taken in the alternative. Particulars of the necessity and the antecedent debts alleged by the defendant must be given in the written statement and it is not enough to state simply that there was legal necessity or an antecedent debt. If the transfer impeached is not of the father, but of another member, and the plaintiff has not admitted in the plaint that the latter was the manager of the family, the transferee must not omit to plead that the transferor was the manager of the family, because if he does not plead that, a mere plea of legal necessity will not justify the transaction. If the father has transferred only his share, the defendant may take an alternative plea that the father was separate from the plaintiff. Where the plaintiff relies on the immorality of the debt which was discharged by the money raised on the mortgage, transferee can succeed on proving that they had made reasonable inquiries and acted *bona fide* (*Periaswami v. Vaidbilingam*, 1937 (Mad.) 718).

Even if the suit is brought after the death of the father, the defendant cannot make a claim for refund of the price paid to the father, on the ground of pious duty of the plaintiff to pay his father's debts, as the price does not become a debt until the sale is set aside. The defendant can, however, in case sale is set aside bring a separate suit for recovery of price paid by him to the father as a debt of the father (*Madan Gopal v. Sati Prasad*, 15 A. L. J. 425, 40 I. C. 451, 39 A. 485; *Raghunath Prasad v. Rambharos*, 100 I.C. 745A). If the defendant is a subsequent transferee from the father's alienee he cannot plead protection of Sec. 41 Transfer of Property Act. (*Shankar v. Daoji*, 33 Bom. L. R. 1000, 1931 A. L. J. 363, 35 C. W. N. 693, 1931 (Mad.) 118, 61 M. L. J. 212).

In a suit in which the plaintiff can succeed only on proof of im-

The plaintiffs claim—

- (1) That the said mortgage and the said decree and sale be declared to be null and void.
- (2) Recovery of possession of the said property.

No. 254—Suit for setting aside a sale in execution of a simple money decree against the father (g)

1. The plaintiff and his father Satya Narayan are, and have always been, members of a joint Hindu family governed by the Mitakshara law of the Benares school.

2. The property described below was the joint property of the said family.

Description of the property

* * * * *

3. In execution of a simple money decree against the said Satya Narayan, one Sobharam attached and sold the said property, and the defendant purchased it on November 14, 1924, but has not yet obtained possession, (or, and obtained possession on January 20, 1925).

morality or illegality of the debt, all that the defendant need plead is a denial of the plaintiff's allegation of immorality or illegality of the debt; the necessity for which the debt was borrowed need not be specified in the written statement though evidence of it may be necessary to rebut the plaintiff's case. If, however, the same is specified the pleading is not objectionable. It has been held in Lahore and Nagpur that if the defendant proves that the plaintiff is merely a figure-head and the real plaintiff is the alienor himself who has caused the suit to be instituted for the purpose of undoing his act, the court should refuse to declare the invalidity of the alienation (*Dad v. Lal*, 82 I. C. 626, 5 Lah. 389, 1925 (Lah.) 24, 6 Lah. L. J. 334; *Gangabai v. Hansadas*, 103 I. C. 905, 1927 (Nag.) 213, 10 N. L. J. 64).

Propositions of law, e.g., that the mortgage is bindings on the plaintiff, or that the plaintiff cannot question the acts of this father should never be stated in the written statement.

(g) A judgment-creditor of a father can sell the whole joint family property, and the sons cannot object to it, unless they prove that the debt was immoral or illegal, and that the auction-purchaser was aware of the fact, but other members of the family, e.g., nephews or brothers

4. The bond, on the basis of which the said decree was passed was executed by the said Satya Narayan to pay the losses which he had incurred in speculating on the price of wheat with the said Sobharam during the seasons of 1920 and 1921. The losses on the said wheat transactions amounted to Rs. 690 for the season of 1920 and to Rs. 390 for the season of 1921.

5. The defendant was, at the time of his auction-purchase, aware of the facts alleged in para. 4 above.

The plaintiff claims—

- (1) A declaration that the said auction sale is null and void against the plaintiff and that the defendant is not entitled to any portion of the said property under the said sale; and
- (2) Recovery of possession of the said property.

**No. 255—Suit for setting aside an alienation
by one member or a family (h)**

1. The three plaintiffs and defendant No. 2 are brothers and form, and have always formed, joint Hindu family governed by the Mitaskhara law of the Benares school.

2. The house described below is the ancestral property of the plaintiffs and defendant No. 2.

3. By a sale-deed, dated February 14, 1925, defendant No. 2 purported to sell the said house to defendant No. 1

of the judgment-debtor can have their shares released simply on showing that they were not parties to the decree. The latter may simply show that they have got a share in the property and that they were not parties to the decree. The former must further not only allege that the debt was illegal or immoral but should also give full particulars of the alleged illegality or immorality. In such cases the plaintiff can recover his own share in the property and not the whole property as in the case of a mortgage.

Limitation : For declaration, 3 years. For possession, 12 years.

(b) As to the capacity of one member to alienate family property or any part of it, see note (f) *ante*. This form of action may be used even if the transferor was the manager. The defendant transferee allege that the transferor was the manager and the facts justifying the transfer. If, however, it is admitted in the plaint that the transferor was the manager, it should be alleged that the transfer was made without

The plaintiff claims—

(1) A declaration that the said sale is void, and recovery of possession of the said house.

(2) Or, in the alternative, if defendant No. 2 be found to be separate from the plaintiffs recovery of plaintiff's 3/4th share in the said house.

No. 256—Suit by a wife against her husband for maintenance (i)

1. The plaintiff was married to the defendant in 1918 and is still the wife of the defendant.

2. On November 14, 1923, the defendant married a second wife, one Smti. Ramo, and thereafter began to beat the plaintiff and confine her in a room for days together, without giving her food, and has, on January 6, 1924, without any justification turned her out of his house, and threatened that if she attempted to return he would kill her.

3. The defendant is a big landlord having house property yielding a net income of about Rs. 900 per mensem and having regard to the position of the parties and the needs of the plaintiff, the plaintiff claims Rs. 200 a month as her maintenance.

a legal necessity. If the transferor has described himself in the deed of transfer as a manager and that fact is intended to be denied, it is better to deny it in the plaint thus: "The said defendant No. 2 is not the manager of the said joint family." But it must be remembered that the mere omission of the transferor to describe himself in the deed as manager would not prevent the transferee from showing that he was the manager and competent to transfer (*Chhajju Mal v. Multan Singh*, 1936 (Lah.) 996). In view of the opinion of the Patna High Court about the competency of every member to alienate family property (*See note (f) ante*) it will be necessary to allege in every such suit that the transfer was made without family necessity. If the suit is brought for declaration that the alienation is void to the extent of plaintiff's share, the extent of such share should be determined with reference to the date of suit (*Viswesara Rao v. Varahanarasimham*, 1937 (Mad.) 631).

(i) Ordinarily a wife's place is with her husband and she is not entitled to live apart from him and claim maintenance (*Nagamma v. Rajiya*, 110 I. C. 30, 1928 (P. C.) 187, 48 C. L. J. 17). Section 2 of the Hindu Married Women's Right to separate Residence Act (19 of 1946), how-

The plaintiff claims—

- (1) A decree fixing Rs. 200 a month as the plaintiff's maintenance and directing the defendant regularly to pay the same to the plaintiff.

ever, entitled her to live separate in certain circumstances and yet claim maintenance from him. The said Act has been repealed by the Hindu Adoptions and Maintenance Act (78 of 1956). Section 18 (2) of the last mentioned Act entitles a wife to live separate from her husband without forfeiting her claim to maintenance if (a) he is guilty of desertion i.e. of abandoning her without reasonable cause and without her consent or against her wish or of wilfully neglecting her or (b) he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with him or (c) if he is suffering from a virulent type of leprosy or (d) he has any other wife living or (e) he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere or (f) he has ceased to be a Hindu by conversion to another religion or (g) there is any other cause justifying her living separately. But she is not entitled to maintenance while living separate from her husband if she is unchaste or ceased to be a Hindu by conversion to another religion. **In a suit for maintenance, therefore, she should allege in the plaint the grounds on which she claims separate maintenance and the amount she claims.** Such amount is generally fixed in accordance with the position and status of the husband and the needs of the wife, and these should be alleged in the plaint. She should be enabled to live consistently with her position as the wife of her husband with the same degree of comfort and reasonable luxury (*Gajendra Nath v. Sulochana*, 68 C. L. J. 559). The plaintiff may, if she likes, also ask for a charge on the property belonging to her husband. But as the husband is liable personally, independently of the fact whether he has any property or not, no charge attaches to his property until it is attached by a decree; therefore if the husband transfers his property pending a suit by the wife, the transfer is not void under Sec. 52, Transfer of Property Act. The case of the widow's suit against the husband's relations is different as in that case the right of the widow is dependent on the existence of property in the hands of the relations (*Paruchuri v. Surugutchi*, 101 I. C. 806, 52 M. L. J. 520, (1927) M. W. N. 314), while husband's liability is not dependant on possession of property (*Radhabai v. Gopal*, 1944 (Bom.) 50); *Satyanarain Murthy v. Ram Subbamma* (1963) 2 An. W. R. 400).

Against husband suit may be brought at the place where marriage was performed, *Smt. Chandrawati v. Suraj Narain*, 1955 All. 387.

If after obtaining a decree, she resumes cohabitation with the husband, the decree becomes ineffective and cannot be executed (*Venkayya v. Raghavamma*, 1941 M. W. N. 978).

Ordinarily maintenance is granted from the date of suit, but if demand was made before arrears from date of demand should be granted

(2) Rs. 400 for arrears of maintenance, at Rs. 200 a month, for the period the plaintiff has been living separately from the defendant.

No. 257—Suit by a widow against her husband's brothers for maintenance (j)

1. The plaintiff is the widow of Sant Lal who died 8 months ago.

2. The defendants are the brothers of the said Sant Lal and were joint with him at the time of his death.

(*Pallamreddy Andema v. Varadareddy*, 1949 Mad. 31, 1948 M. W. N. 224, 1948-1 M. L. J. 30). In suit based on the ground of husband marrying another wife, maintenance can be awarded from date of second marriage (*Vasunthadevi v. Rama Krishna*, *ibid*).

If the maintenance claimed is not more than Rs. 500/- a month, it is sometimes more convenient to have recourse to the Criminal Court under Sec. 488, Cr. P. C. But an order under that section is no bar to a suit for more maintenance than that awarded by the magistrate.

Defence: In such cases the defendant may charge the wife with unchastity or may show that the reasons alleged by her for living separate from him are not sufficient. The amount may also be contested. Unchastity will disentitle a wife even to maintenance due under a bond executed by the husband (*Sita Devi v. Narayan Singh*, 111 I. C. 762, 1928 (Pat.) 375). An offer to take the wife back is a good defence unless the wife can show sufficient grounds justifying her refusal. Such grounds would be the same as would be sufficient to justify the refusal of restitution of conjugal rights to the husband (*Venkatapathi v. Puttamma*, 165 I. C. 314, 1936 (Mad.) 609). That the wife has got private means is not a complete defence, but this may affect the amount of maintenance (*Bai Appibai v. Khimji*, 162 I. C. 188, 1936 (Bom.) 138). But it has been held in Madras and Andhra that private income should not even affect the amount of maintenance (*Annapoorna v. Veeraraghav*, 1940 (Mad.) (547. *Nunevarabalu v. Nunesithamma*, 1961 A. P. 272 F. B.).

Limitation for a suit under the Hindu Law for declaration of right of maintenance and fixing the amount of maintenance is 3 years from the time the right is denied (Art. 58), and for arrears of maintenance after maintenance has been fixed it is 3 years from the date when the amount is payable (Art. 105). When maintenance is not claimed under Hindu Law, the suit for declaration will be governed by Art. 58 and in respect of arrears by Art. 113. If maintenance is claimed under a contract, Art. 55 will govern the suit.

(j) This Precedent relates to a case where the widow's husband died before the commencement of the Hindu women's Right to Property Act, 1937. Where the death takes place after the coming into force of the Act the widow will inherit a share in her husband's separate as

3. The defendants are in possession of the property detailed at the foot of the plaint, in which the said Sant Lal had, at the time of his death, an interest as a co-parcener.

4. Since the death of the said Sant Lal, the plaintiff has been living with her father.

well as coparcenary property and cannot claim maintenance. If the husband leaves no property and the widow has no property of her own nor has any other earnings she can now under the Hindu Adoptions & Maintenance Act (78 of 1956) sue her son (natural or adopted) or her daughter for maintenance. If she is a childless widow she can sue her step-son. If the widow happens to be a minor she can, during her minority, claim maintenance from her parents also. If she is unable to obtain maintenance from any one of the aforesaid persons she may claim it from her father-in-law. But this obligation shall not be enforceable if the father-in-law has not the means to meet it from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share. Widow's claim for maintenance against all above mentioned persons shall cease if she re-marries or ceases to be Hindu. There is no charge on the property unless one is created by decree or agreement (*Jamnabai v. Balakrishna*, 102 I. C. 104, 53 M.L.J. 176; *Mohini v. Purna*, 30 C. W. N. 153, 55 C. L. J. 198, 1932 Cal. 451 Contra *Ramarayudu v. Sitalakshamma*, 1937 (Mad.) 915), in which a charge on her husband's share was maintained. If there is no such property, the widow has no right to be maintained by any relation except that there is a moral (but not legal) duty of the father-in-law to maintain her out of his separate property, but on his death the heirs who take that property become legally bound to maintain her. (*Ethirajamma v. Subbarayuden*, 1938 N. W. M. 1135) The donees or devisees, however, are not so bound (*Sankar-murthy v. Subbamma*, 1938 M. W. N. 922, 1928 (Mad.) 914). Even a permanent concubine, whose connection with the deceased was an open one and who resided permanently and openly as a member of the family is entitled to maintenance (*Bai Nagubai v. Bai Monghabai*, 96 I. C. 20), but she must be a Hindu. A Muhammadan mistress is not so entitled (*Haidri v. Nariandra*, 13 O. L. J. 245, 1926 (Oudh) 294, 93 I. C. 767, 3 O. W. N. 284). A suit may be brought either for declaration of the amount of maintenance or for arrears of maintenance, or for declaration of charge for maintenance on the husband's property. The last-mentioned relief is particularly necessary where there is a danger of the property being transferred by the heirs of her husband. It has been held that in such a case she would be able to realize her future maintenance by execution of the decree, and cannot be driven to a separate suit for sale of the property charged (*Indramani v. Surendra*, 64 I. C. 852, 35 C. L. J. 61, 1922 (Cal.) 35; *Radhakrishna v. Bachni*, 1937 (Pat.) 654, 172 I. C. 234). In such a suit the plaintiff must allege her right and the amount she claims and facts showing defendant's liability. The property to be charged must be specified. In a suit for arrears, it should be alleged that the maintenance

5. The defendants have been wrongfully withholding maintenance from her and have not paid anything on account of it.

6. The total income of the property detailed below is Rs. 15,000 a year, and the plaintiff claims a sum of Rs. 200 as her monthly maintenance.

was wrongfully withheld by the defendant (*Sheshama v. Sabbaravadu*, 18 M. 403), as mere non-payment may be due to the plaintiff not needing it as when she comfortably lives with her parents. No previous demand is however necessary (*Panchakshara v. Pattammal*, 39 M. L. T. 32, 1927 (Mad.) 865; *Parwati ai v. Chatru*, 39 B. 131; *Ramarayuda v. Sitalakshmamm*, 1937 (Mad.)). There used to be a long period of limitation for suit for arrears of maintenance, viz., 12 years from the date when it becomes payable, but the court had a discretion to cut down the arrears of maintenance if they were claimed after a very long time (*Mallipedi v. Mallipedi*, 1925 (Mad.) 795) and to award arrears at a lower rate than that fixed for future maintenance (*Gurusiddappa v. Parwatewa*, 167 I. C. 973, 1937 (Bom.) 135). Now the period has been curtailed to 3 years under Art. 105 of the Act of 1963. It is not the law that a Hindu widow cannot claim or get arrears of maintenance prior to the date on which she makes a demand for such arrears. Arrears of maintenance are a debt and ordinarily there is no bar to the claim for arrears (*Hari v. Namadha ai*, 4 D. R. H. (Nag.) 130). But in a case where the circumstances are such that the conduct of the widow in sitting quit amounts to an implied abandonment of the claim, there is no justification for demanding any maintenance for any period prior to the suit (*Andemma v. Varadareddy*, 1949 (Mad.) 31). The amount of maintenance will be fixed with regard to the income of the family property and the position and status of the plaintiff, but cannot be more than the income of her husband's share in the property. The income of even property subsequently acquired by the joint family should be taken into account (*Chunilal v. Bai Saraswati*, 1943 (Bon.) 393). The general principle is that the sum awarded must enable the lady to live consistently with the position of a widow in something like the degree of comfort and with the same reasonable luxury of life which she enjoyed in her husband's lifetime (*Mt. Ekradedwari v. Homeshwar*, 56 I. A. 182, 8 Pat. 840, 27 A. L. J. 695, 31 Bom. L. R. 816, 49 C. L. J. 579, 116 I. C. 409, 1929 (P. C.) 128, 27 M. L. J. 50). The widow's income from separate property cannot be taken into consideration (*Annapooranma v. Veeraraghav*, 1940 Mad. 547; *Nunevarabalu v. Nunesithamma*, 1961 A. P. 272 F. B.). The amount of maintenance includes residence or the cost thereof and a widow is not therefore entitled to maintenance equal to her husband's share in joint family property, plus residence (*Kewarlam v. Isri ai*, 1926 (Sindh) 153, 93 I. C. 353; *Padi ai v. Mangolomal*, 1940 (Sindh) 188). Maintenance fixed by agreement or decree can be enhanced or reduced on a proper case being made out for change due to change in the circum-

The plaintiff claims—

(1) An order to the defendants to pay Rs. 200 a month to the plaintiff on account of maintenance.

(2) A declaration of a charge for such payments on the said property.

stances (*Ibid*; *Chinnamal v. Venkatasami*, 101 I. C. 752 M! *Sansar Chand v. Shanti*, 96 I. C. 255 L. *Ram Pal Singh v. Lal Surendra B. Singh*, 166 I. C. 194, 1937 (Oudh) 82), except when the terms of the agreement expressly and definitely lays down that no change would be made (*Kameshwaramma v. Thammanera*, 1939 (Mad.) 798; *Trimbak v. Mst. Bhagubai*, 1939 (Nag.) 249). But where the circumstances are such that a claim for increase should be considered to have been waived a suit for increase would not lie, e.g., when the husband and wife agreed to live apart, the husband agreeing to pay to the wife the income of a certain property as maintenance and the wife agreeing not to claim maintenance from any other property, she cannot, after his death, sue the executors for increased maintenance from other property. (*Pursbottamdas v. Rukshamani*, 170 I. C. 897, 1937 (Bom.) 358). It has been held by the Chief Court of Oudh that the amount should not be varied on every fluctuation in the income, but only on a permanent increase or decrease. (*Maheshwari Prasad v. Sahdei*, 165 I. C. 227; 1936 O. W. N. 902). Any personal income made by the widow by her own exertions will not justify reduction (*Bai Jaya v. Ganpatram*, 1941 (Bom.) 305, 196 I. C. 607.) The increase can be effected from the date of order and not in respect of past arrears (*Trimbak v. Mst. Bhagubai*, 1939 (Nag.) 249; *Savitribai v. Radha Kishan*, 1948 (Nag.) 44). If maintenance is fixed by a written agreement it can be varied by an agreement but if it is fixed by a decree it cannot be varied without a suit (*Ghasi Ram v. Kundan Bai*, 1940 (Nag.) 163).

Defence : The plaintiff's unchastity used to be a complete defence but is not so if the suit is not under Hindu law but under an agreement (*Shivalal v. Bhai Sankli*, 33 Bom. L. R. 490, 132 I. C. 444, 1931 (Bom) 297; *Bhuep Singh v. Lachman Kr.*, 26 A. 321). (Contra *Kishanji v. Lakshmi*, 33 Bom. L. R. 510, 1931 (Bom.) 286, which is a single Judge case) or if it is under the Hindu Adoptions and Maintenance Act, 1956. Her remarriage was also a defence except when, by the custom of her own caste, she was entitled to re-marry (*Mangat v. Bharto*, 49 A. 203, 100 I. C. 734; *Gajadhar v. Mt. Sukhdei*, 5 Luck. 689, 121 I. C. 899 Contra *Santala v. Bahdaswari*, 50 C. 727, 75 I. C. 11; *Vithu v. Govinda*, 22 B. 321). But now under Act 78, of 1956, it is a complete defence.

If, however, a widow, though at first unchaste, has given up that life and leads a moral life, she will be entitled to *bare* maintenance, i.e., just sufficeient for her living (*Bhikubai v. Hariba*, 49 B. 459, 27 Bom. L. R. 13, 1925 (Bom.) 153, 94 I.C. 665 ; see *Mh. Shibi v. Jodh Singh*, 1933 Lah. 747). The defendants cannot compel the plaintiff to live with them (*Mt. Ekrareshwari v. Homeshwar*, *supra*) unless the husband's will contains any such condition (*Girianna v. Honarma*, 15 B. 236 ; *Tin-*

(3) Rs. 1,600 on account of arrears of maintenance for 8 months, at Rs. 200 a month.

MUHAMMADAN DIVORCE (k)

No. 258—Suit of divorce on ground of husband's impotence

1. The parties are Muhammadans.

2. The plaintiff was married to the defendant on April 6, 1921, and thereafter the parties resided together at the defendant's house until September 10, 1924, when the plaintiff returned to the house of her father.

3. The defendant was, at the time of the said marriage, impotent and is till impotent, and has not, and cannot, consummate the said marriage.

couri v. Krishna, 20 C. 15), and her refusal to live with the defendants is no ground for reducing maintenance (*Bhairon v. Ram Sewak*, 107 I. C. 552, 1928 (Oudh) (1). The Allahabad High Court has held that even such a direction in the husband's will can be ignored for just cause (*Jamuna Kunwar v. Arjun Singh*, 1940 A. L. J. 750). In a suit for arrears, defendant may show a waiver or abandonment. The fact that the widow has separate private funds which also yield an income is irrelevant if the income of the joint family property is sufficient for the maintenance of all members (*Khodandarani v. Chenchamma*, 1930 (Mad.) 479; *Jai Ram v. Shiva Dei*, 1938 (Lah.) 344, 177 I. C. 539). So also the fact that she has received some property under her husband's will, if that property is insufficient (*Kanakshi v. Krishnammal*, 1938 M. W. N. 64, (1938) 1 M. L. J. 252, 47 L. W. 146, 1938 (Mad.) 240, 177 I. C. 688). So also the fact that she has a right to a share in the non-agricultural property of her husband under the Hindu Women's Right to property Act, (*T. Sarojini v. T. Sri Krishna*, 1944 (Mad.) 401). But the fact that she has got ornaments (which are her Stridhan) of great value which are of no use to her and which she can dispose of can be taken into account. (*Gurushiddappa v. Parwatewva*, 167 I. C. 973, 1937 (Bom.) 135). That the joint property has been sold away is no defence, unless the sale was made for a family purpose which has priority to the maintenance, otherwise the coparcener will be personally liable to the extent of the joint family property sold away by him (*Chunilal v. Bai Sarsawati*, 1943 (Bom.) 393).

The fact in the life-time of the husband the widow has refused to obey a decree for restitution of conjugal rights passed against her is no defence, (*Perimbal v. Sundrammal*, 1945 (Mad.) 193, 220 I. C. 334).

(k) Such a suit at the instance of the husband is unnecessary as the husband can very easily divorce the wife by pronouncing the divorce and no assistance of the court is required. A wife may obtain dissoul-

4. The plaintiff, was, on the said September 10, 1924, wholly unaware of the impotency of the defendant.

The plaintiff claims dissolution of her marriage with the defendant.

No. 259—Suit for divorce on ground of la'an

1. The parties are Muhammadans.

2. The plaintiff was, on November 14, 1918, married to the defendant and is still wife of the defendant.

3. On January 14, 1924, the defendant filed a complaint before the Sub-Divisional Magistrate of Gaya against one Muhammad Hashim under Section 498, Indian Penal Code for having enticed away the plaintiff, and in the complaint he falsely charged the plaintiff with having committed adultery, and made the following false statement regarding the plaintiff :—"My wife Smt. Shakuran had illicit connection with the accused person before she ran away and she has committed adultery with the accused person."

tion of marriage by mutual agreement with her husband, but under the Hanafi law she could not claim a divorce through court, except (1) on the ground of the impotence of the husband, or (2) on the ground of la'an. The Muslim law in this respect has now been modified by the Dissolution of Muslim Marriages Act, 1939, Sec. 2 of which provides that a woman may obtain a decree for dissolution of marriage on seven other grounds, namely :—(i) that the whereabouts of the husband have not been known for a period of four years; (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years; (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards; (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years; (v) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease; (vi) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; provided that the marriage has not been consummated; (vii) that the husband treats her with cruelty, that is to say—

- (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical illtreatment, or
- (b) associates with women of evil repute or leads an infamous life, or

The plaintiff claims that her marriage with the defendant be dissolved.

MUHAMMADAN INHERITANCE

No. 260—Suit by a Muhammadan heir for possession against a widow, with alternative offer to pay dower debt

1. One Muhammad Ali was the owner of the property detailed at the foot of the plaint.

2. The said Muhammad Ali, died in August 1921, leaving behind him Hamid Ali, his brother, and the defendant, his widow, as his only legal heirs and thus Hamid Ali inherited 144 out of 192 sihams out of the said property.

3. The said Hamid Ali died on September 4, 1923, leaving the plaintiff, a son, Smti. Kulsum, a widow and Smti. Hajra, a daughter, as his only heirs and the plaintiff thus inherited 84 sihams and Smti. Kulsum inherited 18 sihams out of the 144 sihams of the said Hamid Ali in the said property.

- (c) attempts to force her to lead an immoral life, or
- (d) disposes of her property or prevents her exercising her legal rights over it, or
- (e) obstructs her in the observance of her religious profession or practice, or
- (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

If a Mohamadan wife stays away from husband without any justifiable grounds, she is not entitled to dissolution of marriage *Mst. Mobiya Khatun v. Shri Anwar Ali* A. I. R. 1971 (Cal.) 218.

The specific ground on which dissolution is claimed must be alleged in the plaint with full particulars where the same are necessary.

A decree on ground No. (i) does not take effect for a period of six months and if within this period the husband appears and is prepared to perform his conjugal duties, the decree is set aside. Formerly it was held that when dissolution is claimed on the ground of husband's impotency the court should postpone the case for one year and dissolve the marriage if the infirmity continues at the end of the year. It was also held that this was not necessary where the parties had the opportunity of cohabitation before the date of suit, or when the husband consented to an immediate final decree. It is now provided in the Act that it is

4. The said Smti. Kulsum died in November, 1924, leaving the plaintiff, a son, Smti, Hajra, a daughter, and Smti. Bano, mother, and the plaintiff thus inherited 10 out of the 18 sihams of the said Smti. Kulsum in the said property.

5. The plaintiff is thus now owner of 94 sihams out of 192 sihams in the said property.

6. In reply to a notice sent by the plaintiff to the defendant, the latter has, by a letter dated June 4, 1923, asserted a claim to the possession of the said property in lieu of her alleged dower debt of Rs. 10,000.

7. The defendant's dower was verbally agreed, at the time of her marriage, to be only Rs. 2,000.

8. The dower debt of the defendant was verbally relinquished by her in the presence of the said Muhammad Ali a few hours before the latter's death.

9. Alternatively, the said dower debt has been satisfied by the usufruct of the said property.

The plaintiff claims—

(1) Possession of 94 out of 192 sihams in the said property.

(2) Rs. 294 on account of the three years mesne profits in respect of the said share, as per account given below.

only on the application of the husband that the court shall make an order requiring him to satisfy the court within one year that he has ceased to be impotent and if he satisfies the court no decree shall be passed. Unless the husband makes an application for such an order a final decree can be passed. If a divorce is claimed on ground (ii) it is not necessary to show that the default is wilful. It is immaterial whether the default was due to poverty, loss of work, failing health or imprisonment or any other cause (*Manak Khan v. Mt. Malekhan*, 1941 (Lah.) 167, 194 I. C. 567).

If a husband neglected a wife for 10 years, and during the last 2 years was made to pay maintenance money under orders of a magistrate, wife can base her suit on the ground of neglect prior to those 2 years (*Asoma Bai v. Umar Mahomed*, 1941 (Sindh) 28, 193 I. C. 847). The word neglect in section 2 (ii) implies wilful failure and the words 'has failed to provide' imply omission of duty; consequently, where the wife through her own conduct led the husband to stop maintenance, the court would not allow dissolution of marriage (*Mt. Badrulnisa Bibi*

In the alternative,

(1) that an account be taken from the defendant of the profits which she has realized from the said property from the date of her possession upto date;

(2) if any surplus is found in the defendant's hands after satisfaction of his dower debt, possession of 94 out of 192 sihams in the said property, with proportionate share out of the said surplus; and

v. *Md. Yusuf*, 1944 All. 23; *Zafar Hussain v. Akbari Begum*, 1944 Lah. 236; *Contra Mt. Noor Bibi v. Pir Bun*, 1950 (Sind) 8).

In a suit on the ground of *la'an*, the plaintiff must allege the particulars of the imputation of adultery made by the defendant, i. e., when, and on what occasion, it was made, whether verbally or in writing and, in the latter case, the writing should be identified. The exact words of the charge had better be quoted. Though the more reasonable view would be as held in *Khatijabi v. Umar Shah*, 52 B. 295 110 I. C. 131, 1928 (Bom.) 285, that only false imputation would give a right to the wife to claim divorce, yet, according to the orthodox Muhammadan Law, there is no such restriction and any imputation (whether true or false) would entitle the wife to claim divorce (*See Wilson's Anglo-Muhammadan Law*). In the case (*Md. Husain v. Begam Jan*, 93 I. C. 1017 L.) a decree was passed on the ground of an accusation without proof that it was false because the High Court considered that in the circumstances it was impossible to prove that it was true. They did not commit themselves to the proposition that even a true charge gives the wife a right to claim divorce. An old case of 1882 is cited in Amir Ali's Muhammadan Law also in which even a true charge of infidelity was held to be a good ground for giving the wife a divorce. But the imputation should be an unequivocal charge against the fidelity of the wife. If the charge is that a third person enticed away the woman and committed adultery without her consent, there is no charge against her. A suit for dissolution of marriage under Muhammadan Law lies on the ground of a false charge of adultery. The Act, however, nowhere provides, that in case the dissolution is sought on the ground of a charge of adultery against the wife, its effect can be nullified if the husband retracts the charge (*Kallo v. Imamam*, 1949 All. 445).

Limitation: 3 years under Art. 113. When dissolution is claimed on the ground of impotency advantage of S. 22 can be taken as the cause of action is continuous (*Mt. Sahibzadi v. Abdul Ghafoor*, 1939 (Lah.) 454).

Defence : There is ordinarily no defence except denial of the allegations. A suit on the ground of impotency may be defended on the ground that the infirmity is not permanent, but is temporary. In the case of a suit on the ground of *la'an* a retraction is a good defence, (*Tufail Ahmad v. Jamila Khatun*, 1962 All. 570), but it must be unqualified re-

(3) if any portion of the dower debt is found to be still due to the defendant, possession of 94 out of 192 sihams in the said property conditional on the plaintiff paying his proportionate share out of the said portion of the dower debt.

RESTITUTION OF CONJUGAL RIGHTS

No. 261—Suit for restitution of conjugal rights (1)

1. The defendant was married to the plaintiff on November 14, 1918, and is still the wife of the plaintiff.

2. The defendant has, in February, 1924, deserted the plaintiff and lives at her father's place, and without any lawful excuse refuses to come to the plaintiff's house.

The plaintiff claims a decree directing the defendant to live with the plaintiff and to allow the plaintiff a free exercise of his conjugal rights with the defendant.

traction of the accusation by admitting that it was false, and should be made in the beginning. A qualified retraction made or one made at the end of trial was held to be insufficient (*Abdul Ghani v. Nanhi*, 24 A. L. J. 88; *Abdul Rahman v. Mt. Shah Bibi*, 118 I.C. 680, 1929 (Nag.) 262; *Shamsannessa v. Mir Abdul*, 70 C. L. J. 289, 194 (Cal.) 95, 186 I. C. 605; *Saju v. Mujsed*, 45 C. W. N. 122).

(1) In such suits it is necessary to allege the marriage and, if denied, to prove it strictly. The fact that the defendant had deserted the plaintiff should be alleged. (*Lalitagar v. Bai Suraj*, 18 B. 316). In a Burma case, it was held that before the suit there should be a demand in a conciliatory form (*Ezra v. Ezra*, 54 I. C. 65, 12 Bur. L. T. 120), but in case of Muhammadans this is not necessary (*Binda v. Kunsilia*, 13 A. 126). Such cases are usually instituted by husbands against wives though, there is nothing in the Muhammadan Law to prevent a wife from instituting a similar suit against the husband, and, in fact, O. 21, R. 33, C. P. C. contemplates the possibility of such suits. In execution of a decree for conjugal rights the wife cannot be sent to jail, and both the passing and the enforcement of such decrees are entirely within the discretion of the court. A wife cannot be compelled to live with husband if her life is apprehended to be in danger. (*Shakila Banu v. Gulam Mustafa* A. I. R. 1971 Bom. 166)

Sometimes it so happens that relations of the wife also prevent her from going to her husband. In such cases, an injunction may be claimed against them, but, unless it is proved that they are responsible for her not going to the plaintiff, an injunction cannot be granted, and, when granted, it will not be to restrain the parents from harbouring

No. 262—Suit for restitution of conjugal rights with a prayer for injunction against the relation of the wife

1. Defendant No. 1 is the wife of the plaintiff, and defendant No. 2 is the father, and defendant No. 3 is the mother of defendant No. 1.

2. Defendants Nos. 2 and 3 had called defendant No. 1 to their house in October, 1923. Since then defendants Nos. 2 and 3 have been preventing defendant No. 1 from coming to the plaintiff and defendant No. 1 now refuses to come to the plaintiff's house.

her, but to restrain them from preventing her from going to the plaintiff (*Bai Jamma v. Dayali*, 44 B. 544, 57 I. C. 571).

Forum : Suits for restitution of conjugal rights under the Hindu Marriage Act, 1955 can only be instituted in forum provided under that Act.

Limitation : 3 years under Art. 113 but Sec. 22 applies and therefore such a suit is practically never barred.

Defence : Besides denial of marriage, the defendant wife may successfully plead physical or legal cruelty of the husband as a justification for refusal to go to the plaintiff. **Full fact of the alleged cruelty must be laid before the court**, for an ordinary exchange of verbal abuse or the husband leading an immoral life would not be legal cruelty. There should be a real danger to the health or life of the woman if compelled to live with her husband, (*Jamiruddin v. Sahara*, 101 I. C. 760 C.) and mere disagreement between the families of the parties is no defence (*Bajid v. Satto*, 48 I. C. 231 Punj.), nor petty quarrels between the husband and wife nor the ill health of the wife (*Kuppanimal v. Kuppanana Chari*, 24 I. C. 380, 26 M. L. J. 361). But something short of even legal cruelty may in certain cases amount a good defence as the court has to find from all the circumstances whether it is a proper case in which to pass a decree (*Dular Koer v. Dwarkanath*, 34 C. 971). It has been held that a false accusation of adultery made by a husband also amounts to legal cruelty (*Maqbulan v. Ramzan*, 4 O. W. N. 247, 101 I. C. 261, A. I. R. 1927 (Oudh) 154, 2 Luck. 482). Beatings at irregular intervals extending over a considerable period as a result of which the wife is in a condition of mental anxiety, apprehension and unhappiness, furnish a good defence (*Tanni v. Kallu*, 25 A. L. J. 1100; *Mt. Sofia v. Syed Zahir Hasan*, 1947 All. 16, 1947 A. L. J. 157). Insanity, leprosy, and syphilis of the husband have been held to be good defences under the Hindu Law (*Binda v. Kaunsilia*, 13 A. 126; *Yamuna v. Narayan*, 1 B. 264), but not impotence (*Purshotam v. Mani*, 21 B. 610). Even impotence not known to the wife at the time of marriage may be a defence under the Muhammadan Law, as that is ground for

The plaintiff claims—

(1) A decree directing the defendant to live with the plaintiff and to allow him a free exercise of his conjugal rights.

(2) An injunction restraining defendants Nos. 2 and 3 from preventing defendant No. 1 from coming to the plaintiff's house.

No. 263—INTERPLEADER SUIT (m)

1. On June 15, 1919, one Ramkishan, now deceased deposited with the plaintiff for safe custody, four G. P. Notes of Rs. 1,000 each (being Nos.) and box of jewellery.

annulment of marriage. Sodomy or bestiality may also be a good defence under any law. Non-payment of prompt dower is no defence according to the Allahabad High Court (*Hijaban v. Ali Sher*, 19 A. L. J. 880), but according to Bombay High Court this will be a defence in the sense that a decree conditional on payment of dower will be passed, but if the marriage has been consummated non-payment of dower will in no case be a defence (*Abdul v. Hussenbi*, 6 Bom. L. R. 728; *Bai Honsa v. Abdulla*, 30 B. 122). But courts have always discretion to grant the relief on any conditions they think proper *e. g.*, payment of dower (*Anis Begum v. Malik Muhammad Istafa*, 1933 (All.) 634, 1933 A. L. J. 1079). That defendant is under 13 years of age, will be a good defence, as intercourse with a wife of that age is a criminal offence, but mere minority of the husband is not. It has been held that a decree passed against a minor is annullity (*Mathein v. Maungpa*, 1937 (Rang.) 226, 170 I. C. 532). An agreement by the plaintiff to allow the defendant to live separately from the plaintiff is void and can be no defence (*Abdul v. Hussenbi*, 6 Bom. L. R. 728). Abandonment by a Hindu husband of his wife may be a good defence (*Sitabai v. Ramchandra*, 12 Bom. L. R. 373, 6 I. C. 525; *Baburam v. Kokla*, 22 A. L. J. 68, A. I. R. 1924 (All.) 301, 79 I. C. 634; *Bai Jur v. Nar singh*, 101 I. C. 403, 29 Bom. L. R. 332); gross failure to perform marriage obligations *e. g.*, not caring to call the wife for 10 years, not consummating marriage and marrying another wife and living with her, may be a ground for refusing a decree (*Imam Baksh v. Amiran*, 107 I. C. 607 L.), so also plaintiff's neglect of the wife for 20 years since marriage and 13 years after her puberty and his definite rejection of wife's offer to join him (*Jagram v. Lakshmi* 1940 M. W. N. 525). Long unexplained delay may be a ground for refusing the relief which is discretionary (*Mr. Bano v. Ghulam*, 165 I. C. 961, 1936 (Lah.) 752).

(m) Such suits cannot be brought by an agent or tenant against his principal or landlord so as to compel him to interplead with any

2. The said Ramkishen died in 1922.
3. The defendant No. 1 claims the said notes and box from the plaintiff as the adopted son of the said Ramkishen.
4. Defendant No. 2 also claims the same from the plaintiff as the widow of the said Ramkishen and denies the adoption of defendant No. 1.
5. The plaintiff is ignorant of the respective rights of the defendants.
6. The plaintiff has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such person as the court shall direct.
7. There is no collusion between the plaintiff and either of the two defendants.

The plaintiff claims—

() that the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation to the said property;

(*ii*) that they be required to interplead together concerning their claims to the said property and it may be declared which of the defendant is entitled to it.

(*Add. if necessary, iii*) that the said property may be allowed to be deposited in court or some person may be authorized to receive the same pending this litigation;

(*iv*) that upon delivery of the same to such person or depositing the same in court, the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 264—Interpleader suit

(*Form No. 40, Appendix A, C. P. C.*)

(*Title*)

A.B., the above named plaintiff, states as follows :—

1. Before the date of the claims hereinafter mentioned,

person claiming adversely to such principal or landlord (O. 35, R. 5); but a Railway company is not an agent for the purposes of this rule, (*Chaganlal v. B. B. & C. I. Ry. Co.*, 17 Bom. L. R. 330). The requirements of a plaint are given in O. 35, C. P. C.,

G. H. deposited with the plaintiff [*describe the property*] for [safe-keeping].

2. The defendant C. D. claims the same [under an alleged assignment hereof to him from G. H.].

3. The defendant E. F. also claims the same [under an order of G. H. transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the court shall direct.

6. The suit is not brought by collusion with either of the defendants.

The plaintiff claims—

(1) that the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto;

(2) that the defendants may be required to interplead together concerning their claims to the said property;

(3) that some person be authorized to receive the said property pending such litigation;

(4) that upon delivering the same to such [person], the plaintiff be discharged from all liability to either of the defendants in relation thereto.

PARTITION

No. 265—Suit for partition of joint Hindu family property (n)

1. The plaintiff and the defendants are members of a joint Hindu family and their relationship with each other will appear from the following pedigree :—

Limitation : 3 years under Art. 113.

Defence : Any defendant may plead that there is collusion between the plaintiff and the other defendants; or that he never preferred any claim to the property, or that he is the owner of the property.

(n) Such suit can be brought by any co-parcener or by a purchaser of the interest of any co-parcener. A minor co-parcener can

Pedigree

* * * * *

2. The property detailed at the foot of the plaint is the property of the said joint family and the parties are in joint possession of the same. (Or, property entered in schedule A is in the possession of the plaintiff that entered in schedule B is in possession of defendant No. 1 and that entered in schedule C is in possession of defendant No.2).

not, however, bring a suit, unless it is proved that partition would be for his benefit. He should, therefore, allege this in his plaint. Even if an agreement for partition is entered into between the minor's father and his brother it cannot be enforced unless it is shown that it was fair and not injurious to minor's interest (*Kishan Lal v. Lachmichand*, 170 I. C. 577, 1937 (All.) 456). In view of the provisions of the Hindu Succession Act females can acquire absolute interest in the separate as well as coparcenary property of a deceased Hindu. As such they can claim partition. But an exception has been made in respect of a dwelling house in which they can claim a separate share only when male heirs choose to divide their respective shares.

In the Punjab a son cannot sue in the lifetime of his father (*Punjab National Bank v. Jagdish*, 163 I. C. 114, 1936 (Lah.) 390). According to the Bombay High Court, a son cannot sue in the lifetime of his father if the latter is joint with his brothers or father.

Parties : All co-parceners, females who are legally entitled to a share, purchasers and mortgagages of the interests of co-parceners, are necessary parties to a partition suit. Females entitled to a provision for their maintenance and marriage are also considered, by some, to be necessary. In any case, they are proper parties. A grandson is not a necessary party as his interest is represented by his father (*Thakur v. Sant Singh*, 1933 (Lah.) 465, 141 I. C. 567); where division between two branches of a family is claimed it is sufficient according to Lahore High Court, if the heads of those branches are parties and it is not necessary to join all co-parceners (*Bishambar v. Kanshi*, 1 L. 483, 1932 (Lah.) 641). In a suit by auction purchaser of the share of a co-parcener, such co-parcener is not necessary party (*Delu Singh v. Jagdip*, *infra*).

A mortgagagee of undivided share is a proper party as his security will, after partition, be upon divided share. If he has proceeded to a sale on his mortgage the auction purchaser will be a necessary party (*Jadu Nath v. Parameshwar*, 1940 (P. C.) 11, 185 I. C. 234). But a person holding a lease cannot be joined as a defendant on the ground that he is *benamidar* for the family when it appears that he is claiming a paramount title (*Nilkantha v. Ramnarayana*, 1949 (Mad.) 410, 1948-2 M. L. J. 404).

The suit should embrace the whole co-parcenary property, unless any portion is not immediately available for partition or where it is held jointly by the family with a stranger (*Purshottum v. Atmaram* 23 B. 597; *Harey H. Sinha v. Hari C. Sinha*, 40 C. W. N. 1237),

3. The share of the plaintiff in the whole of the said property entered in the said three schedules is $\frac{1}{4}$ th. [If the plaintiff is a minor, add an allegation about benefit, *e.g.*

4. The defendant No. 1 is the father of the plaintiff and manager of the said family.

Hardeo v. Mahadev A. I. R. 1966 All. 543). If the suit is by a purchaser of the interest of a co-parcener, he may sue only for partition of the property in which he has a share (*Ram Mohan v. Mulchand*, 28 A. 39; *Delu Singh v. Jagdip*, 1948 Pat. 317, 28 Pat. 398) but according to the Bombay, Calcutta and Madras rulings, even he must sue for a general partition (*Murarrao v. Sitram*, 23 B. 184; *Palani v. Masa*, 20 M. 243; *Koer Hasmat v. Sunder Das*, 11 C. 396). But in the converse case of a suit by co-parceners against the auction-purchaser of a share in a particular property, there is no difference of opinion as to the right to sue for partition of such property alone.

If some property is left out and no objection is taken by defendant, or if by consent of parties some property left in joint possession, a subsequent suit for its partition will lie (*Gopulal v. Gajasa*, 1932 Nag. 92, 138 I. C. 186), but not if the decree for partition declares that any property will remain joint (*Sasimohan v. Harinath*, 32 C. W. N. 1023.)

If any property is left out the Court has no power to compel the plaintiff to include it but should dismiss the suit (*Chandi Shah v. Bhora Shah*, 120 I. C. 544, 1930 (Lah.) 286).

If the properties are within the jurisdiction of different courts, Sec. 17, C. P. C. permits a suit to be brought in any such court, but if a part of the property is within the jurisdiction of a foreign court, the same may be excluded from the suit brought in India. As a matter of fact even if such property is included, Indian Court will have no jurisdiction to partition it (*Prem Chand v. Hiralal*, 1928 (Nag.) 295, 111 I. C. 135), nor can any order be passed as regards movables outside India when the defendant does not reside in India (*ibid*).

All that has to be alleged in a plaint for partition is the plaintiff's title to the share claimed, with such particulars of that title as are necessary, and the fact that the property is joint. Reasons for partition are not necessary to be alleged, *e. g.*, that there are family quarrels or differences between co-shares, etc. The mere fact of the property being joint gives a sufficient cause of action for a suit for its partition, as a right to claim partition is incidental to every joint ownership (*Kishanlal v. Lotan Singh*, 39 P. L. R. 876). Nor need any prior demand for partition be alleged, as none is necessary to enable the plaintiff to sue for partition (*Rajendra v. Brojendra*, 37 C. L. J. 191). Of course **when a suit is by a minor member of the co-parcenary, the reasons for claiming the partition must be alleged.** It has been held in the case of *Varadaminal v. Anibalal J. Vyas* A. I. R. 1971 Mad. 371 that a notice on behalf of a minor demanding partition of family property brings about severance in joint status from the date of expression of such intention. The date of the cause of action for a suit for partition would

5. The said defendant No. 1 is leading an immoral life and has incurred enormous debts and has been transferring portions of the family property, and the plaintiff apprehends that the whole family property would be wasted. The defendant No. 1 has made the following, among other, mortgages and transfers :—

* * * *

probably be the date when plaintiff acquired an interest in joint property. When the plaintiff is a co-parcener this would be the date of his birth. If the plaintiff is a purchaser the date would be the date of his purchase. If the plaintiff has been excluded from the enjoyment of joint property, the date of such exclusion may be alleged as that of the cause of action.

It should also be mentioned in the plaint whether the plaintiff is or is not, in joint possession of the property, as that would determine the court-fee to be payable. In the relief claimed, the plaintiff need only claim partition and separate possession. He need not pray for appointment of commissioner to carry out the partition, or for any other matters of detail and procedure, as it is for the court to determine whether a commission is necessary or not and to give such directions for carrying out the partition as it thinks fit. But if the plaintiff wants any special matter to be taken into consideration for which an adjudication may be necessary, *e. g.*, that the plaintiff has spent his own money in improving a particular item of the joint property and wants that property to be allotted to him, or the value of the improvement to be credited to him, he must not only make a prayer for the same but should also make allegations of such facts in the body of the plaint. In a joint Hindu family if the manager has been in receipt of cash for the family the plaintiff may ask for an order to him to render accounts of the savings in his hands for the purpose of partition (*Vikuntam v. Avudiappa*, 170 I. C. 234, 1937 (Mad.) 127). This account is unlike that of a trustee and is intended only to discover what are the joint properties of the family and in the absence of fraud or other improper conduct, the parties have no right to look back and claim relief against past inequality of enjoyment of the members (*Jyotibali v. Lachhmeshwar*, 1930 (Pat.) 260; *Bhaurao v. Mangha*, 1961 N. L. J. Notes 435; *Jyoti Bhushen v. Gopal Chand*, 1959 A. L. J. 110 (Summary of Cases)). The members are not entitled to any interest on the savings. All expenditures made by him must be accepted and a member can only show that they were not incurred in fact but cannot show their impropriety (*ibid*). In the absence of fraud and other improper conduct the only account of Karta is liable for is as to the existing state of divisible properties (*Narayan Swamy Iyer v. Rama Krishna Iyer*; A. I. R. 1965, S. C. 289). The plaintiff may also ask for account from the date when separation takes effect. Separation takes effect ordinarily when the plaintiff sues for partition but if the plaintiff is minor it does not take effect until the court decides that partition should be made, *e. g.*, until it passes

6. For the above reasons it would be to the plaintiff's benefit to have his share separated by partition].

The plaintiff claims partition of the said property and separate possession of the plaintiff's 1/4th share.

No. 266—Suit for partition by purchaser of the interest of one co-parcener

1. The defendants are members of a joint Hindu family.
2. The property detailed in the plaint is a part of the joint property of the said family and the defendants have been, and are, in joint possession of it.

a preliminary decree (*Hari Singh v. Pritam Singh*, 1936 (Lah.) 504; *Ram Singh v. Fakira*, 182 I.C. 72, 939 (Bom.) 169); *Boddapeti v. Kondeti*, 1960 A. P. 70; see also *Lakkireddi Chinna v. Lakkireddi Lakshamma*, 1963 S. C. 1601 where it has been held that a suit by a minor for partition does not abate and can be continued by his legal representative and decree passed if the court thinks that the suit was instituted for the benefit of the minor.

Mesne profits are not ordinarily allowed in a partition suit but when plaintiff has been kept out of enjoyment he may be given mesne profits (*Sanbeerangonda v. Basanganda*, 184 I. C. 337, 1939 (Bom.) 313).

A minor suing for partition of joint family property may claim his share freed of all encumbrances and transfers, challenging the transfers as not binding on him. He should implead the transferees as defendants. He may also pray for cancellation of any decree passed against joint property. In such cases, he will have to pay separate court-fee under S. 7 (IV) & S. 7 (IV) (a) in addition to the fee for partition (*Ramaswami v. Rangachariar*, 1940 (Mad.) 113, 186 I. C. 494) see contra 1962 Orissa 102).

If a defendant also wishes to have his share partitioned off, he may make an application to the court to that effect, and the court shall separate his share also. (As to court-fees to be paid by defendant see under "Defence" below). If the defendant does not so desire, the court will separate the share of the plaintiff alone but ascertain and declare the shares of all of them (O. 20, R. 18, C. P. C.).

There is a clear distinction between a *malafide* partition and an unreal or fictitious partition. When the intention is that the past creditors of the father may be defeated or delayed and no provision is made in the partition for the payment of their debts, the partition is *malafide* and is not binding on the past creditors. The son may, however, intend, or where he is a minor, his guardian, or even the father may intend, that the son's interest may be safeguarded against future liabilities which may be contracted by the father. In such a case the partition may be genuine and not unreal. Where the intention is to

3. On November 14, 1922, at an auction sale in execution of a decree No. 475 of 1920, passed by the 1st Munsif of Burdwan, the plaintiff purchased the interest of defendant No. 1 in the said property, but has not obtained possession (or, has on June 20, 1924, obtained joint possession through the court).

defeat or delay the past creditors as well as to save the property from the clutches of the future creditors the partition may be *malafide* far as the past creditors are concerned, but it may not be unreal or fictitious as so far as the future creditors are concerned.

Where, however, the intention is that the joint family status of the parties is not to be disrupted, the partition is not only a *mala fide* transaction but is unreal. In order, however, to judge whether a partition is unreal the interest of the son at whose instance the partition is effected has to be looked into. If it is found that it is to the interest of the son that he should cease to be joint with his father so that his rights in the family property may be safeguarded for the future, the presumption is that the partition is real. This presumption is stronger when the son is minor. In such a case the mere fact that no arrangement for the payment of the past debts of the father has been made or that the partition has been made with the concurrence of the father or that no partition by metes and bounds has been effected is not enough to displace the presumption of genuineness of the partition. (*Hirday Narain Rai v. Ram Das*, A. I. R. 1951 All. 606).

There is no warrant for the contention under the Hindu Law that no partition can be demanded by any person who is, more than four degrees removed from the last owner. A Hindu co-parcenary is a much narrower body than a joint Hindu family. Every member of a joint Hindu family is not a co-parcener. A co-parcenary consists of persons who acquire by birth an interest in the joint or co-parcenary property. The right by birth entitles a co-parcener in most cases to demand a partition of the co-parcenary property. To this rule there is an exception recognised in the State of Bombay where a son is not permitted to claim partition when his father is living in union with his own collaterals. Subject to this exception, the right to demand a partition is the necessary result of the right by birth which a co-parcener has in the undivided property of the co-parcenary. Every co-parcenary obviously begins with a common ancestor, but it is not the rule of Hindu Law that such a co-parcenary is necessarily limited to four degrees from the common ancestor. Broadly stated all members of a joint Hindu family who are not removed more than four degrees from the last holder are co-parceners, however, much remote they may be from the original holder or acquirer of the property. It is no doubt true that if a person is removed by more than four degrees from the last holder, he does not acquire any interest by birth in the property of the family, and as such he is not entitled to demand a partition. But even in such a case, as soon as the last holder dies, the distance between the next holder and person

4. The share of defendant No. 1 in the said property was on the date of the said auction sale, one-third.

The plaintiff claims partition and separate possession of the said 1/3rd share.

who was more than four degrees removed from the last holder would be reduced by one degree with the result that such person would be entitled to enter the co-parcenary and would be clothed with the right to demand a partition of his share in the properties of the family. When a person has acquired a right by birth in properties of the family, she right cannot become divested by reason of the fact that persons in possession of the properties are more than four degrees from the person claiming partition. The right of a person to partition has to be decided principally by reference to the question as to whether such person had a right by birth in the properties sought to be partitioned. Once he has acquired a right by birth, his right cannot divested or extinguished merely because he seeks to enforce his right against persons who are more than four degrees removed from him (*Dasrath Rao Ganpat Rao v. Rom Chand Rao Vidbia Rao* A.I.R. 1951 Bom. 141).

A transaction by which a Hindu father makes a division of his self-acquired property among his sons is a transaction by which he, in the first instance, effects a severance of status among his sons, in the second instance he notionally throws into the hotchpotch his self acquired property, according to his pleasure. When the father thus treats what is his self acquired property or ancestral property by proceeding to distribute it between his sons during his life-time there is nothing in that act which would come in the way of his making an unequal distribution of his self acquired property. Nor can such transaction be regarded possibly as one of the five transactions mentioned in the Transfer of Property Act, as requiring registration namely, sale, mortgage, exchange, lease for more than one year or a gift. (*Kishan Singh Mohan Singh v. Vishnu Bal Krishna*, A. I. R. 1951 Bom. 4).

Under Hindu Law and joint status is a matter of intention. The Supreme Court has held that partition results severance from intension to severe the joint status followed by conduct to effectenate that intention. Without such intention mere specification of shares do not result in partition (*Ganga Narain v. Brijendra Nath Chaudhary* A.I.R. 1967 s.c. 1124). A co-parcener's declaration of intention to separate must also be brought to the notice of other members and then it relates back to the date of manifestation of intention (*R. Raghavamma v. Cheehamma* A. I. R. 1964 s. c. 136). Revenue paper entries of ownership in equal shares along-with some co-owner's statement that they are separate and render accounts to different coowners according to their shares is the best evidence of separation (*Charanjit Das v. Debi Das* A. I. R. 1957 All. 522, *Durga Pd. v. Ghansham Das* 1948 p. c. 210). Mere disagreement between sfather and son does not amount to a declaration of son's intention to eparate from the family (*Indra Narayan v. Doop Narayan* A. I. R. 1971 s. c. 1962). In the case of a minor co-paracener, a mere declaration of intention to separate by his next friend or the institution of a suit by him on the minor's behalf does not cause a severance in status, as

No. 267—Another suit for partition of joint family property

Paras. Nos. 1 and 2 as in Precedent No. 266.

3. Of the houses mentioned in the list of joint property at the foot of the plaint, the house No. 1 has all along been in the possession of the plaintiff and his father, and the plaintiff has built a second storey in it with his self-earned money at a cost of Rs. 2,000.

the declaration by the next friend cannot be regarded as a binding declaration. The minor cannot as of right demand a partition. It is only granted by the Court in its discretion, if it comes to the conclusion that a decree for partition is for the benefit of the minor or in his interest. Where the Court decrees a suit for partition brought on behalf of a minor, such decree relates back to the date of the institution of the suit for the purpose of determining the date of the severance in status (see *Lakkireddi v. Lakkireddi*, 1963 S. C. 1601).

Where both the plaintiff and the defendant are minors, and a partition is alleged to have taken place between them it cannot be held to be binding unless confirmed or ratified by the minors on coming of age. (*Tukaram v. Gangawai*, A. I. R. 1952 Hyd. 23).

Where a suit for partition is not filed by the lawful guardian but by a next friend of a minor, the volition exercised by such next friend takes effect conditional on the court finding ultimately that the severance dates back to the date of notice on behalf of the minor demanding partition. (*Rama Krishnayya v. Achyuthar amayya*, 1952 M. W. N. 784).

The definition of shares entered in the Khewats may be a factor, along with other facts in the case, to be considered by court for the purpose of arriving at a finding whether a family is joint or separate. Such an entry is not in itself conclusive evidence of separation (*Ram Khilawan v. Sri Ram*, 1952 All. 191; *Balmukand v. Gokaran*, 1956 All. 124).

According to the notions of Hindu law, hereditary priesthood must be treated as immovable property capable of partition (*Bhurthu v. Bhushan Prasad*, A. I. R. 1952 Nag. 307; *Angoorbala v. Devabrata*, 1951 S. C. 295; *Rajkali v. Ramaratan*, 1955 S. C. 493).

There is no justification why an Insurance policy taken in the name of a member of a joint family should not be taken into account while making a partition, if the premia of the policy were paid out of the joint family funds. (*Manbarran Lal v. Jagiwan Lal*, A. I. R. 1952 Nag. 73).

Where a father of joint Hindu family sells a specific property to a stranger and the sale is neither for legal necessity nor for payment of an antecedent debt, the sons, are entitled, instead of bringing a suit for general partition, to sue for partition and possession of their share in the particular property which has been sold, in order to get rid of the joint possession of the stranger. (*Savandarbai v. Ram Ji Govinda*, 1952 N. L. J. 435).

4. Of the movable property of the joint family detailed in the plaint, the plaintiff is in possession of the following articles of jewellery and is prepared to place it in the hotch-potch, and the rest is all in the possession of the defendant. (Description of jewellery).

A partition once made cannot be reopened except on the ground of fraud or mistake in including property which did not belong to the joint family. If certain property is omitted from partition it is not necessary to reopen partition but the excluded property can be divided according to the shares. It continues to be joint property till it is thus divided. But if a property has been wrongly included and subsequently passes out of the possession of a sharer, he is entitled to compensation out of the shares of the other parties and the partition may, if necessary, be reopened for readjustment of shares. (*Balaji Ganoha v. Annapurnabai*, I. L. R. (1952) Nag. 99).

Except in the case of reunion, the mere fact that separated co-parceners choose to live together or act jointly for purposes of business or trade in their dealings with properties would not give them the status of co-parceners under the Mitakshara Law. (*Bhagwati Prasad v. Rameshwari Kuer*, A. I. R. 1952 S. C. 72).

The general principle is that a Hindu family is presumed to be joint unless the contrary is proved. Where there is a separation of one member, it would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other members or they remained united. There is no presumption either way. The burden would be on the party who asserts the existence of a particular state of things (separation or jointness) on the basis of which he claims relief. (*Bhagwati Prasad v. Rameshwari Kuer*, A. I. R. 1952 S. C. 72).

An attachment of the undivided share of a member of Mitakshara causes a severance of status. If the creditor attaches an entire property as belonging to his debtor whereas the latter has only a share in it or attaches a larger share than actually owned by the debtor, it will nevertheless be effective. There is thus no reason why the purported attachment of a larger share will not have the effect of causing a partition, if it is otherwise effective as an attachment of the real share and if it carries with it all the incidents of a valid attachment to that extent (*Muneswari v. Jugal Mohini*, A. I. R. 952 Cal. 368).

A suit by a member of joint Hindu family for partition of residential house impleading only such of the members as are interested in the property in suit, is maintainable. Members who are interested in the joint family properties other than the property in suit are not necessary parties. The plaintiff need not bring into the hotchpotch all the properties which belong to the joint family (*Kasiwar Basu v. Nakuleswar Bose*, A. I. R. 1952 Calcutta 738).

The plaintiff claims (1) Partition of the said property and separate possession of his 1/4th share.

(2) That house No. 1 be allotted to the plaintiff's share.

The Court may pass a preliminary decree declaring the share of the parties to be divided actually by a final decree or may, if convenient, grant a final decree at once, *e. g.*, in case of cash. If it passes preliminary decree, the subsequent procedure differs in different provinces. At some places, the case continues and the Court takes steps to pass a final decree without any application by the plaintiff, while elsewhere the Court leaves the case after passing a preliminary decree and does not take up the matter of actual partition until moved to do so. It has been held in Oudh where the latter practice prevails that there is no limitation for such application and in one case the chief Court drew up a final decree 12 years after the preliminary decree was passed (*Lalta Prasad v. Brabma Din*, 5 Luc. 280). Where a prayer for *mesne profits* is also joined, such profits can be awarded in final decree. (*Swaminath Odyar v. Gopal Swami Odayar*, (1.38) 2 M. L. J. 704, 1.38 M. W. N. 1214).

Family debts : If the father has incurred any debts which the son is under a pious obligation to pay, either sufficient property must be allotted to the father in addition to his proper share to cover the son's proportion of debts or the debts must also be equally divided between the co-shares. If this is not done the creditor will be entitled to recover the debt from the shares of the sons also after partition (*Subramania v. Sabapathi*, 110 I. C. 141, 51 M. 61, 192. (Mad.) 654; *Ganga Ram v. Lalumal*, 125 I. C. 39; *S. N. Jakati v. S. M. Borkor*, 1959 S. C. 2.2) but the sons should be made party to the suit or decree before their share can be attached (*Surajmal v. Motiram*, 41 Bom. L. R. 1177, 1950 Bom. 278; See contra: 1954 Mad. 264—The S. C. left this question open in *Kalwa Devattan v. Union of India*, 1964, s. c. 880). The proper course is to make provision for payment of the debts and to partition the rest of the property only (*Sat Narain v. Sri Kishen*, 164 I. C. 6, 40 C. W. N. 1382, 1936 (P. C.) 277; *Krishnamurtby v. Sundarmurtby*, 55 K. 55., 13. I. C. 251, 32 M. 381; *Virupaks v. Chanalal*, 1943 (Mad.) 652, 1943 M. W. N. 429); Creditors of the father can be made parties to a suit for partition and the father can insist that provision should be made in the decree for payment of those debts provided of course they are legally binding on the sons (*Gangaram v. Lalumal*, *supra*). Where any alienees are also party, attempt should be made as far as possible to allot to them the property alienated to them (*Virupaksha v. Chanalal*, *supra*).

Costs : The practice of Calcutta and Patna High Courts is not to allow any costs upto the stage of preliminary decree unless there are exceptional circumstances, *e. g.*, a frivolous contest by the defendant and the mere fact that before the suit the plaintiff demanded partition and defendant took no steps to agree to the proposal is no ground for awarding the plaintiff any costs from the defendant (*Ambica v. Pradip*, 42 C. 441, 19 C. W. N. 233, 28 I. C. 446; *Promotho v. Bipin*, 125 I. C. 1928). Where on the basis of a clause in the will under which the parties

(3) That the materials of the second storey of house No. 1 be not taken as part of the joint property.

claimed, which put a restriction on partition, the defendant pleaded that there could be no partition, the Calcutta High Court did not allow any costs (*Harey H. Sinha, v. Hari C. Sinha* 40 C. W. N. 1237).

Limitation : 3 years under Art. 113; but as this is a continuing right under Sec. 22, partition suit can be filed any time during joint possession of the joint property. If the plaintiff is out of possession, limitation is 12 years from the date of exclusion (Art. 110). Where the plaintiff was a purchaser of the interest of a co-parcener, Art 120 was held to apply if he was not in joint possession (*Bai Shevant Bai v. Janardhan*, 184 I. C. 23, 1939 (Bom.) 322). The same limitation applies in cases of movable property also (*Ganesh Dutta v. Jawach*, 31 C. 262 (P.C)). But if the parties are not members of joint Hindu family, art 110 will not apply, and Art. 64 or 65 will apply, depending upon the nature of the claim. Art. 120 was held to apply in any case to partition of movable property, or of property left joint at a previous partition (*Gundayya v. Sidappa*, 173 I. C. 194, (1938) 1 M. L. J. 574, 1937 (Mad.) 599).

Defence : The defendant may dispute the plaintiff's share. He may plead that the plaintiff has been out of possession and should pay *ad valorem* court-fee, or that the plaintiff's title has been extinguished by adverse possession of the defendant, but a mere want of possession of the plaintiff, without actual exclusion, is no defence, hence a plea that the plaintiff has not been in possession within 12 years is not ordinarily sustainable in such cases. If any property has not been included in the partition, the defendant may take that objection. If he has substantially improved any property with his separately acquired money, he may either claim that the portion so improved should be allotted to him (*Nutbehari v. Nainilal*, 167 I. C. 321, 41 C. W. N. 613, 1937 (P. C.) 61), or may claim credit for the expenses incurred. He may plead that there has already been a private partition between the parties, but such previous partition must have been made according to the rights of parties and not merely as a convenience of enjoyment (*Sarat Chandra v. Ganga Charan*, 43 C. W. N. 181, 69 C. L. J. 527). He may plead that any property is impartible under any law or custom, or may set up an agreement of the co-parceners not to make a partition as such agreement is valid, (*Kameshwar v. Rajbansi*, 1943 (Pat.) 433). He may pray for sale of the property, instead of partition, under Sec. 2, Partition Act, showing that the property is incapable of proper enjoyment after partition (*e. g.*, that a house is too small). If the suit is by a purchaser of the share of co-parcener in a dwelling house belonging to an undivided family, the defendant may offer to purchase the plaintiff's share under Sec. 4, Partition Act. Even a defendant may be treated as a plaintiff for the purpose of Sec. 4 (*Satyabbama v. Jotindra*, 116 I. C. 161, 1929 (Cal.) 269; *Sbesadhor v. Kishen Prasad*, 190 I. C. 117 Pat.). An application under Sec. 4 may be made after the preliminary decree (*Mian Jaffar v. Mt. Bibi*, 1943 (Pat.) 79; *Dwarkadas v. Godhana*, 1939 All. 313; but not in execution after final decree *Mst. (Mohamafi Begum v. Md. Nabi*,

(4) That if the house No. 1 be not allotted to the plaintiff, he should be given credit for the cost of the materials of the second storey.

No. 268—Suit for partition between other co-owners(o)

1. The house described below was the property of one Ramlal.

Description of the House

* * * * *

2. The said Ramlal left two sons, Kishanlal and Shamlal.

3. The said Shamlal transferred, under a sale-deed, dated June 4, 1920, his half share in the said house to the plaintiff.

1954 A. L. J. 621), or even at the appellate stage (*Satyabhan v. Satindra, supra*). "Undivided family" does not mean Hindu family only but the family may be Mahammodan (*Rukia Bibi v. Rajia Bibi*, 1953 Mad. 298) or a Christian family (*Chatterji v. Maung Mye*, 1.7 I. C. 844, 1940 (Rang.) 53). Any one of the defendants may apply for separation of his share also, and there is no objection to the prayer being made, in the alternative, in the written statement in which the defendant disputes the plaintiff's right to claim partition. The court cannot refuse the request except for some special reasons (*Lok Nath v. Radha Govinda*, 1926 (Cal.) 184, 86 I. C. 76), but such a request cannot be made after the preliminary decree has been passed (*Ramnarain v. Ramdas*, 111 I. C. 713, 1929 (All.) 65). There is no objection to his claiming share by metes and bounds even in property in which plaintiff has no share but one of the other defendants claims a share (*Insane Nilgobind v. Sri Rukmini*, 1944 (Cal.) 42). The same court-fee which would have been payable on a plaint if the defendant had sued for partition is payable in U. P. on a written statement containing such prayer (Art. 2 A. Sch. 1).

But after a decree has been passed, a defendant cannot apply for separation of his share without applying for amendment of the decree (*Rup Chand v. Kanhayya*, 1940 (Lah.) 202. 188 I. C. 577).

He may plead that he has been in long possession of any item of property or has improved it, and therefore it should be allotted to him (*Dhian Singh v. Dalip Singh*, 18 Lah. L. T. 10).

(o) Every co-sharer in the joint property, whether a minor or major, is entitled to bring a suit for partition of the property. All the remaining co-sharers must be made defendants. It is essential that the plaintiff should be in actual or constructive possession (which may be through another co-owner whose possession is *prima facie* the possession

4. The said Kishanlal transferred, under a sale-deed, dated January 15, 1922, his remaining half share in the said house to the defendant.

5. The defendant is in possession of the said house. The plaintiff claims possession of a separate half share of the said house by partition thereof.

DECLARATION

No. 269—Suit for declaration of title (p)

1. The plaintiff is the owner of the fields detailed at the foot of the plaint and is, and has been, in possession thereof, as such owner.

of the plaintiff also). If, however, he is not in possession at all of any portion of the joint property, and there has been a complete ouster, he must sue for recovery of possession and partition. If, however, the possession of the plaintiff is admitted or established over what forms part of the joint estate the suit does not cease to be one for partition merely because the defendant denies the title of the plaintiff to a share of the estate or to specific lands of the estate and asserts a hostile and adverse possession therein (*Shbjan v. Asanulla* 101 I. C. 622, 31 C. W. N. 406).

All that has to be alleged in the plaint is the bundle of facts showing the plaintiff's title to the share claimed, and showing that the property is joint. It should also be alleged whether the plaintiff is in possession or not. If partition is sought in a particular way *e. g.*, by allotment of a particular property to a particular co-sharer, **fact on which such claim is founded** should be alleged. Almost the same pleas as are mentioned in the last note may be urged by the defendant. All equities between the Co-owners should be worked out, *e. g.*, if the property was jointly purchased but the defendant had advanced more than half the money, he can claim the excess due from the plaintiff before allowing partition (*Poovanalugam v. Veerayi*, 1926 (Mad.) 186, 22 M. L. W. 782).

(p) A declaration can be made only in respect of (a) any right to any property or to any legal character (b) that the defendant has denied or is denying the plaintiff right or character and (c) the plaintiff is not in a position to claim any further relief. These propositions would be clear from the case of the *State of M. P. v. Khan Bhadur H. H. D. H. Bhiwandiwala* A. I. R. 1971 M. P. 65. The power of court to grant a mere declaratory decree is not confirmed to S. 42 Sp. R. Act only. Such decree can be granted independently of S 42 Sp. R. Act such as under S. 9 or order VII rule 7 C.P.C. as laid down by the Supreme Court in the case of *Ramaraghava Reddy v. Sishu Reddy* A. I. R. 1967 S.C. 436. A suit for declaration that the termination of services is illegal and

2. The defendant made an application to the settlement officer that he was the owner of the land and that the plaintiff was his tenant, and that officer has, by an order, dated January 19, 1925, directed that the defendant should be entered in the papers as owner of the said fields.

The plaintiff claims a declaration that he is the owner of the said fields.

the service still subsists would lie if there has been violation of any constitutional or statutory provision (*High Commissioner v. I. M. Lal* 1946 A. L. J. 266, *Surendra Nath v. Indian Air Lines Corporation* A. I. R. 1966 Cal. 272). But suit for declaration about subsistence of purely personal contract will not be as it is not a legal character (*Guntur Tobacco Co. v. Tarabettur* A. I. R. 1965 A. P. 266, *Rama v. Narain* 39 M. 80). A suit would not lie for a declaration of rights affecting only pecuniary liability (*Mahabir Jute Mills v. Kedar Nath*, 1959 A. L. J. 890; *Nathuram v. State*, 1961 M. P. L. J. Notes 172, 1957 C. L. J. 19, nor a suit for a declaration that the plaintiff did not infringe defendant's trade mark (*Mohammad Abdul Kadir v. Finlay*, 111 I. C. 136, 1928 Rang. 256, 6 R. 291), but a declaration that plaintiff is the legitimate son of the defendant can be given (*Haji Abdul Karim v. Mst. Sarayya*, 1945 (Lah.) 266). A declaration of merely legal consequences of want of registration of compromise cannot be made (*Uday Chand v. B. H. Parmar*, 44 C. W. N. 1063). Declaration can be made only against a person who denies, or is interested in denying, such right. The plaintiff should, therefore, show both these things viz., (1) the plaintiff's title to the property or to the legal character and (2) that the defendant has thrown a cloud on it e. g., by claiming it as his own or by denying the plaintiff's title, or by having his name recorded in the papers as a proprietor of the property claimed by the plaintiff. The mere assertion by a plaintiff in possession of property that the defendant intends to transfer the property and that he has declined to admit plaintiff's right does not amount to an invasion of plaintiff's right or to a clear threat to invade that right so as to give cause of action or a suit for declaration (*Nanak v. Faqira*, 1940 (All.) 424, 1940 A. L. J. 459). Though a declaration can be claimed about plaintiff's right and not about absence of defendant's title, yet where the former followed from the latter, the court allowed the suit (*Jasoda v. Mangal*, 45 C. W. N. 570). The object of the proviso to Sec. 42, Specific Relief Act is to prevent multiplicity of suits by preventing a person from putting a mere declaration of right in one suit and then later seeking the remedy without which the declaration would be useless. The "further relief" referred to in the proviso must be a relief flowing directly and necessarily from the declaration sought and a relief appropriate to and necessary consequent on the right or title asserted. (*Manku Charan v. Hari Narain*, 1947 All. 351). See also I. L. R. (1950) Nag. 834). A suit for declaration that the order of termination of the plaintiff's service was invalid was held barred as the plaintiff did

No. 270—Suit for declaration and alternatively for possession

1. The plot of land lying to the south of the plaintiff's house in Muhalla Kazi in the town of Basti and shown on the map annexed to the plaint (which should be deemed to be part thereof) by letter A is part of the plaintiff's said house and belongs to him.

not claim a reinstatement which was considered a further consequential relief. (*Dr. Parmanand v. Dist. Board, Patan*, 1962 Pat. 452).

The Supreme Court has, however, held that if a consequential relief has not been claimed, the suit should not be dismissed without giving plaintiff an opportunity of amendment and that the point relating to omission to claim further relief should not be allowed to be raised for the first time in appeal (*Rukma Bai v. Lakshmi Narain*, 1960 S. C. 335).

Declaration is a discretionary relief and cannot be claimed as of right. It will be refused if it is useless to grant it. (*Sain Das v. Chowla*, 1940 (Lah.) 1, 186 I. C. 646), or it is unnecessary because mere denial of plaintiff's right is not likely to injure him (*Ahmad Yar v. Haji Khan*, 1944 (Lah.) 110).

If the plaintiff's title depends on a contract entered into in contravention of Government rules, the court may refuse the declaration *e. g.*, if a *patwari* acquires land within his circle (*Sbiamalal v. Chakkenlal*, 22 A. 220; *Sheo Narayan v. Mata Prasad*, 27 A. 73).

It is now a well recognised principle of Hindu Law that a testamentary disposition is not strictly speaking an alienation and is not more than a mere assertion. A declaratory decree to avoid only an assertion of that kind cannot be granted. (*Inder v. Mt. Bachin*, 6 D. L. R. (Pepsu) 25).

Courts generally refuse to grant a declaratory decree in a suit challenging an alienation of property where the chances of the plaintiff succeeding to the property are very rare or remote. (*Sukhdarshan Singh v. Chanan Singh*, A. I. R. 1951 Pepsu 81).

A plaintiff's right to maintain a mere declaratory suit must be determined as it exists on the date of the suit and is not affected by the fact that during the pendency of the suit the right to claim consequential relief has also accrued to him. The expression "omitted to do so" in the proviso to Sec. 42 of the Specific Relief Act, apparently refers to the ability of the plaintiff on the date of the institution of the suit and cannot be stretched to include subsequently acquired ability also. (*Jethu Singh v. Kisban Singh*, A. I. R. 1951 Pepsu 48).

There are no doubt cases in which where the property in dispute is in the possession of third party suits may be filed for a mere declaration of title *e. g.*, cases in which the third party in possession is in pos-

2. At the last revision of records of the town of Basti the said plot has been denoted in the *Khasra* by No. 659 and has been shown therein as the property of the defendant.

3. The plaintiff is still in possession of the said plot. The plaintiff claims—

(1) A declaration that he is the owner of the said plot of land.

session on behalf of the real owner. But when that is not the case and the third party claims a hostile title and denies the right of the plaintiff, a suit for a bare declaration of title without a prayer for possession is clearly not maintainable. (*Sannamma v. Erappa*, I. L. R. (1951) Mys. 116). The Supreme Court has held that before property is under attachment U/s 145 Cr. P. C., suit for the declaration is maintainable without any relief for permission (*Deo Kumar v. Shiv Pd.* A. I. R. 1966 S. C. 359). A collateral cannot challenge an adoption or alienation in respect of separate property (*Kishori Lal v. Reg.* A.I.R. 1952 Punj. 387).

A suit for mere declaration that the plaintiff is owner of a portion of the amount deposited in court without consequential relief for refund is maintainable if at the time of the institution of the suit the amount is in possession of the Court pending the decision of the suit (*Neelamoni Sabu v. Khetrabasi Sabu*, A. I. R. 1954 Orissa 37).

Limitation : 3 years under Art. 58 from the date when the right to sue first accrues. Formerly there was limitation of six years for such suits, and it was not necessary that a suit for declaration should be brought, failure to bring it could not for ever prevent the plaintiff from asserting his right. If the plaintiff's title was again denied or any new event happened casting a cloud on his title, he could bring a suit within six years from the new cause of action. Now the law has been changed and the suit must be filed within three years from the date when the right to sue first accrues.

Defence : The defendant may plead that the plaintiff could claim a further relief, such as possession, injunction, etc., and therefore the suit for mere declaration is barred. He must allege the consequential relief which the plaintiff could claim and a bare plea that the suit is barred by Sec. 42, Sp. Rel. Act (as is usually taken) should not be allowed without such particulars. If the consequential relief cannot be granted against the defendant, but is available against a third person, this plea cannot be urged. For example, a suit can be brought for a mere declaration that the plaintiff is the owner of the property and the defendant cannot sell it in execution of a decree against a third person and the defendant cannot plead that the plaintiff is not in possession. Similarly, if neither party is in possession, one may sue the other for declaration of title (*Chinnammal v. Varadarajulua*, 15 M. 307). The consequential relief omitted must be such as could be obtained on the date of suit (*Thakurji v. Kamta Pd.*, 27 A. L. J. 1201, 1929 (All.) 974). Therefore if defendant obtains possession during pendency of a suit for

(2) Alternatively, if the plaintiff is found to be out of possession, possession of the same as against the defendant.

No..271—Suit under O. 21, R. 63, C. P. C. by
a decree-holder (q)

1. The property detailed at the foot of the plaint belongs to one Rahima.

2. The plaintiff attached it in execution of his decree No. 200 of 1924, passed by this court against the said Rahima.

3. The defendant preferred a claim of ownership to the said property and the court allowed the claim and released the said property by an order, dated May 4, 1924.

The plaintiff claims a declaration that the said property is liable to attachment and sale in execution of his said decree.

(For Suit for a declaration that judgment-debtor's transfer is *sham* see precedent No. 196).

declaration the suit cannot be dismissed (*Mogaji v. Anant*, 1948 Bom. 396). A relief for redemption of a mortgage is not consequential to a declaration that the plaintiff as the reversioner of the mortgaged land is entitled to redeem (*Sheo Pd. Singh v. Ram K. Singh*, 181 I. C. 570, 1939 (All.) 249). The defendant may show that the case is one in which the court should exercise its discretion against the plaintiff. It is a mistake, which is too common in the U. P. to plead that the plaintiff has not been in possession of the property within 12 years. Such plea in a suit for declaration of title, as opposed to one for possession, is absurd. If the defendant is in possession, a plea of Sec. 42 should be raised. If the defendant has become owner by adverse possession for over 12 years, that plea should be raised, but the mere fact that plaintiff has not been in possession within 12 years would not negative the plaintiff's title. A defendant cannot raise the question of title of a third person who is not in possession (*Kaniz Fatima v. Jai Narain*, 1944 (Pat). 334).

(q) Such a suit must be brought within one year of the date of the adverse order in the claim or objection case, (Art. 98) otherwise the order will be conclusive. Some Courts have held that it will be so even though the order is not passed on merits *e. g.*, when a claim is dismissed for default (*Ambica Prasad v. Soorajmull*, 43 C. W. N. 999, 1939 (Cal.) 620), or summarily dismissed *Aziz Jahan v. Sardar Singh*, 1955 All. 241, or as one "not pressed" (*Cannanore Bank v. Madhav*, (1941) 2 M. L. J. 956, 1942 (Mad.) 41), and even if the attachment is withdrawn within

No. 272—Similar suit by a third party

1. The plaintiff is the owner of the property detailed at the foot of the plaint.

2. The defendant No. 1 attached the said property in execution of decree No. 400 of 1925 passed by the Subordinate Judge of Madura against defendant No. 2.

the period of one year (*Prem Sukh v. Satya Narain*, 1945 (Pat.) 485). The order is conclusive only as regards the party against whom it is made and in respect of the subject-matter of the claim (*Radbarani v. Binod Moyee*, 74 C. L. J. 180). But if the attachment is not properly made, the limitation of one year does not apply even though an order of attachment has been made and the objection proceeded upon the belief that attachment had been duly made (*Muthia Chetty v. Palaniappa*, 51 M. 349 (P. C.)). The proper parties to such a suit are the persons who had been parties to the case under O. 21, R. 58, and a subsequent purchaser during the pendency of the suit need not be impleaded (*Mt. Naurozi v. Najaf Ali*, 184 I. C. 508, 1939 (Pat.) 321), nor is an alienee from a successful claimant a necessary party to a suit by the decree-holder for setting aside the order allowing the claim (*Mt. Bas Kuer v. Gaya Municipality*, 180 I. C. 983 1939 (Pat.) 138). In a suit by the decree-holder or by a third party claimant, the judgment-debtor is not a necessary party. If an order is passed in favour of an objector in a proceeding to which the judgment-debtor was also made a party, the latter can bring a suit under O. 21, R. 62 (*Sabella v. Malidi*, 25 I. C. 700 M; *Anant Ram v. Damodar*, 22 I. C. 797, 84 P. R. 1914). The rule that a creditor suing to avoid a fraudulent transfer must sue on behalf of all the creditors does not apply to a suit under O. 21, R. 63 (*Chettyor v. Ma sen*, 105 I. C. 582, 5 R. 588; *Mt. Baskuer v. Gaya etc.*, *ibid.*, *Ashgar Ali v. Ishaq Ali*, 1939 A. L. J. 1020, 1940 (All.) 72; *Bu hormai v. Maharaj*, 1946 (Sindh) 78; *Abdul Shakoor v. Arji Papa*, 1963 S. C. 1150).

A suit under O. 21, R. 63 is not controlled by Sec. 42, and can be brought for mere declaration by an unsuccessful objector even if property has been sold and auction-purchaser is in possession (*Krishnan v. Pathma*, 29 M. 151; *Mt. Anrajo v. Ram Dayal Singh*, 1942 (Pat.) 406), and auction purchaser can be impleaded in such a suit (*Tulsidas v. Shivadat*, 103 I. C. 763). If claimant succeeds, sale held before the decision at which the decree-holder himself purchased the property becomes null and void and no formal order to that effect is necessary (*Mt. Bibi v. Mt. Lakho*, 195 I. C. 395, 1941 (Pat.) 405).

Costs incurred in proceedings under O. 21, R. 48 can be claimed in this suit and can be allowed unless the objection was disallowed on account of the plaintiff's default or the attachment was encouraged by his neglect (*V. E. R. M. Firm v. Maung*, 6 R. 408).

A decree in favour of the decree-holder after the property had been released by the execution court on the claim of a third party revives the attachment (*Haran v. Joyc an*, 1929 Cal. 524).

3. The plaintiff preferred a claim to the said property, which was dismissed by an order, dated February 14, 1924.

Similarly where the executing court released the property on the third person's claim being decreed and subsequently the decree was modified in appeal held that the attachment continued in spite of the release (*Ram Kisben v. Kundan*, 7 O.W.N. 213, 121 I. C. 902, 1930 Oudh 265). Notice under Sec. 80, C. P. C. is not necessary if the Government was party to the execution case as the suit is continuation of the claim proceedings (*M. Yusuf v. Province of Madras*, 1943 (Mad.) 341).

Valuation, for jurisdiction should be the value of property or amount of decree, whichever is less if the suit is for a declaration that property is not liable (*Anandi v. Ram Niranjani*, 40 A. 505, 45 I. C. 494; *Khetrapal v. Mumiaz*, 13 A. L. J. 1104; *Banjordoraliji v. The Calcutta & Co.*, 43 C. W. N. 609); but if declaration of title or possession is claimed against judgment-debtor it is the value of property (*Sardar v. Meharchand* (1913) Punj. Rec. 82, 18 I. C. 820).

If suit is by a third party, he must allege his title to the property. If the decree-holder is the plaintiff, he must allege the title of his judgment-debtor to the right which he claims to attach and sell. A mention must be made of the order passed in the objection or claim case. A third party claimant may bring a suit for only a declaration that the property is not saleable, without claiming a declaration of his title by alleging and proving that he was in possession in his own right and not under or in trust for J. D. (*Ramsarn v. Chhotelal*, 110 I. C. 365, 1928 All. 668). The burden of proof in a case under rule 63 is on the plaintiff, but if he is an ostensible owner under a sale-deed which has been held by the execution court to be fraudulent, he will succeed on proof of the sale-deed and the onus of proving that it was fraudulent is on the defendant (*V.E.M.A.R. Firm v. Maung Ba*, 105 I. C. 788, 4 O. W. N. 926, 25 M. L. J. 388, 1927 P. C. 237, 29 Bom. L. R. 481, 32 C. W. N. 28, 46 C. L. J. 349).

Limitation : One year from the date of decision of the objection (Art. 9.) but when the objection is not disposed of on merits or dismissed for delay, e. g., when it is withdrawn, the period of one year does not apply (*Linigama v. Official Receiver*, 110 I. C. 511 M.). But see *Aziz Jahan v. Sardar Singh*, 1955 All. 241, where it was held that the period of one year will apply even where the claim was summarily rejected. (Also see other cases at the beginning of this note). After a year the order becomes conclusive, but that does not mean that Sec. 27 of the Limitation Act would apply and the right will be extinguished. When the execution proceedings come to an end after the order the claimant may sue for declaration (*Bampada v. Ramanath*, 165 I. C. 84, 40 C. W. N. 146).

Defence, in such cases, is usually a denial of the plaintiff's right. A decree-holder, can, without being driven to another suit, plead in defence to this suit, that the transfer under which the plaintiff claims his title was fraudulent and under Sec. 53, Transfer of Property Act,

The plaintiff claims a declaration that he is the owner of the said property and that the same is not liable to attachment and sale in execution of the said decree of defendant No. 1.

REGISTRATION

No. 273—Suit to compel registration (r)

1. On October 4, 1924, the defendant executed the mortgage-deed hereunto annexed, in favour of the plaintiff.

2. On November 14, 1924, the plaintiff presented the said document to the Sub-Registrar of Meerut for regis-

it is voidable against him (*Ramaswami v. Mullappa*, 59 I.C. 947, 36 M. L. J. 340, 43 M. 760; *Bhumraj v. Laxman*, 57 I. C. 430, 22 Bom. L. R. 743). In a suit by a decree-holder, third person claimant can plead that the decree has been discharged by payment by the judgment-debtor and O. 21, R. 2, C. P. C. will not bar such a plea (*Kulathu v. Vaithilingam*, 104 I. C. 163, 3. M. L. T. 207, (1927) M. W. N. 297). Withdrawal of attachment is no defence (*V. S. Aiyar v. Naung*, 192. Ramg. 22., 124 I. C. 26).

(r) Such a suit can be instituted only under Sec. 77 and not independently of it (*Uma v. Chetu*, 95 I. C. 187, 1926 Pat. 89). The plaintiff may, instead of this suit, sue for specific performance of the contract, using the unregistered deed as evidence of contract (*Jhamman v. Amrit*, 1946 (Pat.) 62). It can be brought by a person claiming under a document only when the Registrar has refused to register the document under Sec. 72 or 76 of the Registration Act, that is,—

(1) When the Sub-Registrar refused to register it on any ground other than denial of execution and the Registrar confirms that order in appeal; or (2) when the Sub-Registrar refuses to register the document on the ground of denial of execution and the Registrar refused to interfere on an application made to him under Sec. 73; or (3) the document is presented initially to the Registrar and he refused to register it on any ground except want of territorial jurisdiction or that the document ought to be registered in the office of a Sub-Registrar. The alleged executant of the document is the only person who should be made a defendant, and as a question of title is not within the scope of the suit, a prior purchaser of the property should not be impleaded (*Bikuntha v. Surat*, 1925 Cal. 1257). An order returning a document on the ground that the executant is dead and the question of his successor has not been settled is tantamount to an order refusing to register the document (*Barkha v. Shiv Ram*, 102 I. C. 7.6, 8 Lah. 208, 28 P. L. R. 349). No other claim can be joined in such suit (*Probodh v. Banka*, 56 C. L. J. 413). No suit can be brought after Sub-Registrar's refusal, unless an appeal has been filed and the Registrar has refused registration (*Kisian v. Dalsuk*, 182 I.C. 943, 1939 (Bom.) 254; *Ram Singh v. Jasmer Singh*, 1963 Punj. 100. Registrar is not necessary party, and even if he is impleaded notice under Sec. 80, C. P. C. is not necessary. (*Sultan Ahmad v. Gaudar Begum*, 186 I. C. 505, 1940 (All.) 108).

tration, but the said Sub-Registrar refused to register the same on the ground that the defendant did not appear before him.

3. The plaintiff preferred an appeal to the District Registrar of Meerut, but that officer, by an order, dated January 15, 1925, refused to direct the registration of the said sale-deed.

(Or, 2. On November 15, 1924, the plaintiff presented the said sale-deed to the Sub-Registrar of Meerut for registration, but the defendant denied its execution before the said Sub-Registrar, who therefore refused to register it.

3. The plaintiff applied to the District Registrar of Meerut for reversal of the said order of the Sub-Registrar, but that officer by an order, dated January 14, 1925, refused to direct the registration.)

The plaintiff claims a decree directing the document to be registered.

In such a suit the plaintiff must allege execution of the document, its presentation at the proper time and one of the above three facts. The period of limitation for this suit is very short viz., 30 days from the date of the refusal by the Registrar. In case of a document executed by a lady the question whether it was executed under circumstances which would make it operative as against a pardanashin lady is alien to the enquiry (*Abdul Gafar v. Badial*, 1932 (Cal.) 588, 139 I. C. 234, 55 C. L. J. 103).

Limitation : The period of limitation for this suit is very short, viz., 30 days from the date of the refusal as provided in Sec. 77 itself. If the order is passed in the absence of the plaintiff and the plaintiff had no previous notice of the date on which it was passed the period can be counted from the date on which the order is communicated to him. (*K. V. F. Swaminathan v. Letchmanan Chettiar*, 53 M. 491).

Defence : The defendant may deny execution of the deed, but he cannot raise an issue of invalidity of the document or any other such issue (*Ram Ghulam v. Meda*, 19 A. L. J. 224; *U. T. Jain v. Daud*, 1938 (Rang.) 176, 176 I. C. 140). He cannot plead that the document is not binding on him (*Jwala Sahai v. Balbhaddar*, 88 I. C. 494 Oudh). He may plead that the document was not duly presented for registration or document has been tampered with (*Probadh v. Banka*, *supra*). The Court cannot, in such a suit go into a defence as to whether the document was obtained by fraud or misrepresentation or even a defence that the mind of the executant did not accompany his signature. (*Boparayya v. Bangaraia* 1949 Mad. 215).

PRE-EMPTION (s)

No. 274—Suit for pre-emption based on
Muhammadan Law (t)

1. One Rasula sold $\frac{3}{4}$ th share in the house described below to the defendant by a sale-deed, dated January 14, 1925, for an ostensible consideration of Rs. 4,000.

(s) A right of pre-emption is a right of substitution and is not a right of transfer (*Kundal Lal v. Amar Singh*, 25 A. L. J. 739). A suit for pre-emption can be based on Muhammadan law, or on local custom, or on a contract, or on a special statute (such as the Agra Pre-emption Act). It can be based on more than one of these grounds in the alternative (*Chadammilal v. M. Bakesh*, 1 A. 563; *Maratab Ali v. Abdul Hakim*, 1 A. 567). If such alternative grounds are taken, the allegations required to be made in case of claim on each of such grounds must be fully and separately stated. It has been declared by the Supreme Court that though pre-emption is valid on other ground, all laws or customs allowing pre-emption on the ground of vicinage have become invalid on the coming into force of the constitution and pre-emption on this ground cannot be claimed any more. (*Bhauram v. Baijnath Singh*, 1962 S. C. 1476; *Sant Ram v. Labh Singh*, 1964 A. L. J. 852 S. C.).

If the defendant has not paid the whole money, which the plaintiff admits to be the consideration, to the vendor, but a portion has been left with him for payment to a creditor of the vendor, the plaintiff is liable to pay the defendant only so much as he has paid actually or by passing a pronote or a bond, either to the vendor or to his creditors. If any sum remains unpaid the plaintiff is not liable to pay it to the vendee but will retain it in his hands for payment according to the directions in the sale-deed. The plaintiff, should therefore offer to pay only so much as has been paid by the defendant. If he pays the whole price, though a portion was left with the vendee to pay off a prior mortgage on the property to be pre-empted, he may have to pay the mortgagee over again (*Ram Richa v. Raghunath*, 16 A. L. J. 531). But the plea that he will retain a portion of the consideration for payment to creditors and will not pay the whole to the vendee should be raised in the suit, and if a decree is passed directing payment by plaintiff, plaintiff cannot be allowed to deduct the money left with purchaser for payment to creditors (*Umrao v. Kanwal*, 1933 (All.) 30, 141 I.C. 10, 33 A. 113).

In all cases when the plaintiff does not offer to pay the full amount entered in the sale-deed, he should offer, in the alternative, any amount which the Court thinks proper.

In U. P. with the passing of the Zamindari Abolition and Land Reforms Act (Act I of 1951) no right of pre-emption exists in respect of sale of any immovable property in the area to which the Act applies and all suits for pre-emption pending in any court, whether of the first instance, or appeal or revision stand dismissed.

Description of the house

2. The real consideration was only Rs. 3,000.
3. The plaintiff and Rasula are both Sunni Muhammadans.
4. The plaintiff owns 1/4th share in the house and is a Shafi-i-Sharik and the defendant has no right equal, or superior, to that of the plaintiff.

Limitation : One year from the purchaser taking physical possession, but if the property is not capable of such possession, from the date of registration of sale-deed (Art. 10). Legal disability does not save limitation (Sec. 8). But if the sale is disguised as a mere creation of occupancy rights in order to deceive the pre-emptor, he can claim limitation from the date on which he becomes aware of this fraud (*Ganesha v. Sadiq*, 1937 Lah. 97, 172 I. C. 104)

Court-fee : *Ad valorem* on the value of property according to rules applicable to suits for possession (Sec. 7 (vi)).

(t) There are three classes of pre-emptors under the Sunni Muhammadan Law, viz., (1) co-sharers, (2) participators in appendages and amenities and (3) owners of adjoining property, in cases of houses, gardens, etc. The last class is not recognised in case of zamindari property, and not at all by the Shia law. A suit on the third ground is, however, not maintainable now because of the Supreme court decisions in *Bhauram v. Baijnath Singh*, *supra* and *Sant Ram v. Labb Singh*, 1964 A. L. J. 852). After the sale, and before a suit, a plaintiff has to make two demands; (1) *talab-i-muwasiat* and (2) *talab-i-istishad*. Want of any such demand is fatal to the suit. The plaint in a suit for pre-emption must allege the class of pre-emptors to which the plaintiff belongs, and the fact that the vendee does not belong to any of the two classes or belongs to any class lower than that to which the plaintiff belongs. If the vendee is of the same class as the plaintiff, the plaintiff cannot sue, according to the Calcutta High Court, unless the former has joined with him a stranger (*Sobiram v. Raghubardyal*, 15 C. 224), but, according to Allahabad High Court, the plaintiff and the vendee will take the property in equal shares, and in such a case, the plaintiff must claim pre-emption only in respect of a proportionate share e.g., of half, if there is only one plaintiff and one vendee, a third, if there is only one plaintiff and two vendees (*Abdulla v. Amanatulla*, 21 A. 292). The plaintiff should allege the particulars of the sale, and if he does not admit the consideration, he should state what the real consideration was. He should allege the making of the two *talabs*. If the *talab* has not been made by him but by an agent, the agent should be named.

Transfer in lieu of dower debt is a sale and subject to pre-emption according to the majority of High Courts (*Nathu v. Shadi*, 37 A. 522;

5. The plaintiff heard of the sale for the first time on February 20, 1925, and immediately declared his intention to assert the right of pre-emption.

6. The same day, i.e., on February 20, the plaintiff made a formal *talab-i-ishtishad* in the presence of witnesses, and in the presence of the defendant and the said Rasula (or, on the said house).

The plaintiff claims possession over $\frac{3}{4}$ share of the said house on payment of Rs. 3,000 or whatever sum the court may hold to be the real price (or, of a half share in the said house on payment of Rs 1,500, or half of what the court holds to be the real price).

Saburannesa v. Saledu, 152 I. C. 422, 1934 (Cal.) 693, 38 C. W. N. 747; *Khamrunisha v. Shab*, 21 M. L. J. 958), but the Oudh Court has taken a contrary view in *Chaudhri Talib Ali v. Kaniz*, 2 Luck. 575, for reasons which, it is submitted, do not appear to be sound. The right is also available in Court sales (*Chenne Kunj v. Kesavari* A.I.R. 1966 Ker. 260).

The whole property sold by the sale-deed should be included in the claim except when the plaintiff is not entitled to pre-empt any specified part. (*Zainab Bibi v. Umar Hayat*, 1936 A. W. R. 492, 161 I. C. 753, 1936 (All.) 732). Besides the *talabs*, no other notice or demand or tender is necessary before the suit, and even if one has been given or made in fact, it need not be alleged in the plaint. The plaintiff should, in the plaint, offer to pay the price admitted by him. It is better to offer, in the alternative, whatever the court may find to be the real price, for some High Courts have held that if the price was more than that offered by the plaintiff, the suit should fail, but, it is submitted with respect, this view is unnecessarily strict and is not equitable.

If the suit is claimed to be within time from the date of defendant's taking possession, the date on which the defendant obtained possession must be alleged in the plaint, otherwise the date of registration of sale-deed.

Defence : Besides denial of the right by which the plaintiff claims and of the performance of one or both of the *talabs*, the defendant may plead that he has a superior or an equal right. He may plead a surrender or acquiescence by the plaintiff of his right of pre-emption. He may plead a refusal by the plaintiff to purchase the property before it was actually sold to the defendant, but such refusal can bar the suit only if it was made *after the contract with the defendant had been completed*, and not if the property was offered to the plaintiff before or during the negotiations with the defendant (*Kanbailal v. Kalka Prasad*, 2 A. L. J. 390, 29 A. 670). The defendant may plead that the whole property is not included in the claim. An issue about the price may also be raised. As the right of the plaintiff must extend upto the date of the decree, the defendant may show that the plaintiff has lost that right.

**No.275—Suit for pre-emption based on
local custom (u)**

1. There is a local custom of pre-emption in cases of sales of houses in Mohalla Abupura in the town of Muzaffarnagar. The Muhammadan law of pre-emption is, by the said custom, applicable except that no particular form of *talab* or demand is necessary, but a demand is required to be made in any form.

2—4 (same as paras. 1, 2, 4, in previous Precedent).

5. The plaintiff made a demand of pre-emption by a registered notice sent on March 14, 1925, to the defendant, but the defendant did not give any reply to the said notice. The plaintiff claims, etc.

MINORS

**No. 276—Suit by a minor for setting aside a decree
obtained against him as major (v)**

1. The plaintiff was born in 1907, and is, and in 1923

(u) Where the Mohammadan Law does not apply and there is no statutory law of pre-emption, no pre-emption can be claimed except under a contract or under a local custom or usage. In such cases the Mohammadan Law applies with such changes, if any, as have been made by the said custom. For example, the Mohammadan Law of Pre-emption applies by custom to Hindus of Bihar, that part of Rajasthan which was formerly called Amjer-Merwara and certain parts of Gujrat, and to house property in certain places in the U. P. (e.g., in Muzaffarnagar town, the City of Varanasi and the Kumaun division). The custom prevails in Ahmedabad and Godhra, but not in Khandesh, Madras or Bengal.

In all suits based on local custom, there should be an allegation of the custom. Ordinarily the presumption is that the custom of pre-emption is in accordance with Mohammadan Law (*Ram Prasad v. Abdul Karim*, 9 A. 513) and therefore the terms of the custom need not be detailed in the plaint, but where that law is modified to any extent by custom (e.g., it has been found that *talab-i-ishtishad* is not necessary in case of sales of haouses in a part of Muzaffarnagar town) such modification must be alleged. The plaint should contain all the allegations necessary in a suit under the Muhammadan Law, except those which are not necessary by reason of any modification of the law.

(v) A decree obtained against a person who is described as major but who was in fact a minor is a nullity, *Mahashay Prabhu Dayal v. Man*

was, a minor (or, the plaintiff was born on December 3, 1905 and, was, on November 4, 1923, a minor).

2. The defendant instituted a suit against the plaintiff in this court (being suit No. 225 of 1923), and obtained a decree on (November 4, 1923).

3. The defendant described the plaintiff in the said suit as major, and the said decree was passed against the plaintiff as major.

The plaintiff claims that the said decree be declared null and void.

Sing, 1962 A. L. J. 631; *Nathumal v. Md. Nair*, 1955 All. 584; *Radha Krishan v. Ram Nagar*, 1951 All. 341 F. B.; *Inderpal v. Sarnam Singh*, 1951 All. 823, but an objection cannot be taken to its execution under Sec. 47 (*Sathuranjan v. Guruswami*, 170 I. C. 86, 1937 (Mad.) 509) unless the minority is apparent on the face of the record (*Sitaram Raddy v. Chinnaram Reddy*, 1959 A. P. 159). The Allahabad High Court in a similar case without going into the question whether the judgment-debtor could or could not treat the decree as a nullity, allowed the execution objection to be treated as a suit under Sec. 47 (2) and gave a declaration that the decree was a nullity (*Daulat Singh v. Raja Ramji* 24 A. L. J. 379, 98 I. C. 376). But, in any case, a suit for a declaration of the invalidity of such a decree is maintainable (*Rasbid-uddin v. Md. Ismail*, 6 A. L. J. 688, 3 I. C. 864, 13 C. W. N. 1182, 10 C. L. J. 318, 11 Bom. L. R. 1225, 19 M. L. J. 621). In such a suit the decree can be set aside, without inquiring into any other fact (e.g., prejudice to the minor), even if the plaintiff had fully contested the suit and he himself was under the impression that he was major (*Champi v. Tara Chand*, 22 A. L. J. 665) and even if the decree was obtained on a compromise to which he was himself a party (*Ganganand v. Rameshwar Singh*, 102 I. C. 449 Pat.). All that he has to allege is that he was, at the time of the decree, a minor.

What should happen if a defendant sued as major was, at the time of institution of the suit, a minor, but attained majority during the pendency of the suit, and was major when the decree was passed. In such cases, it is submitted that, if he was minor on the date the summons was served, and he received no notice of the suit after attaining majority, he should be able to have the decree set aside without showing any further prejudice, but if summons was served upon him after he had attained majority, he must show prejudice before the decree can be set aside. This view is suggested by certain observations in the judgment in *Hari Singh v. Muhammad Said*, 102 I. C. 523, 8 Lah. 54, 1927 (Lah.) 200. (See last but two paras. of the judgment). A decree obtained against a major described as a minor is not a nullity and cannot be set aside unless it is shown that the defendant was prejudiced. *Hargovind v. Hukum Chand*, 1924 All. 94; *Sarat Chandra v. Bibhavati Devi*, 1921 Cal. 584).

No. 277—Minor's suit for setting aside a decree on ground of irregularities (w)

1. The plaintiff was born in 1916 and is a minor and sues through a next friend Smt. Ramo, his mother.

2. The defendant brought a suit (being suit No. 105 of 1924) in this court, for the enforcement of a mortgage bond, dated May 10, 1918, alleged to have been executed by the plaintiff's father Chandrabhan, in respect of joint family property belonging to the plaintiff and the said Chandrabhan.

3. The plaintiff was impleaded in the said suit as a defendant, and the said Chandrabhan was appointed as his guardian *ad litem*.

(w) If a minor is sued as a minor, but either a proper person is not appointed as his guardian or there have been irregularities in the appointment of the guardian, *e.g.*, there has been no formal order of appointment, or usual notices have not been sent or consent of the guardian to his appointment has not been taken, or the interest of the guardian was adverse to the minor, the decree is not a nullity, and cannot be challenged in execution proceedings but can be set aside by a regular suit if it is shown that the minor has been prejudiced (*Mahadeo v. Somnath*, 48 A. 828; *Aramitta v. Auditbrao*, 105 I. C. 537, 29 Bom. L. R. 1357; *Phul Kuer v. Nabimunisa*, 125 I. C. 779; *Radhey Shyam v. Gopal Rai*, 169 I. C. 508, 1937 (All.) 374; *Brij Kishan v. Lal Narain*, 1954 All. 599, *Abhiman Singh v. Ram Hit Singh*, 1958 All. 437; *Umar v. Mahabir*, 1940 Pat. 59; *Madhusudhan v. Jagendra*, 1945 (Pat.) 133). In certain cases *e.g.*, *Balkrishan v. Topeshwar*, 15 C.L. J. 446, 14 I. C. 845; *Murlidhar v. Pitamber*, 20 A. L. J. 329; *Sellappa v. Masa*, 1924 Mad. 297, 76 I. C. 1018, 45 M.L.J. 675, it was observed that when a father was appointed guardian of his minor son in a suit on a mortgage made by the father himself, his interest must be presumed to have been adverse and the decree should be set aside; but this view has since been modified in later cases and it has been held that even in such cases prejudice to the minor must be shown, *e.g.*, by showing that the debt was not for a legal necessity (*Abdul Karim v. Thakurdas*, 113 I. C. 843, 1928 (Cal.) 844, 32 C. W. N. 655; *Sundar Lal v. Hari Har*, 1937 (All.) 552, 171 I. C. 36, 1937 A. L. J. 468; *Venkatasomeswara v. Lakshmanaswami*, 115 I. C. 801, 1929 (Mad.) 213). In Bombay and Patna, the same view has been taken (*Chitradhar v. Khedar*, 1938 (Pat.) 437, 177 I.C. 886; *Mahadeo v. Shankar*, 1943 (Bom.) 387). In other cases, it may be necessary to go into the merits of the case, and the plaintiff should allege in the plaint both the irregularity as well as the prejudice, as the former, without the latter, would give no cause of action (*Venkatachala v. Paramasivam*, 104 I. C. 405, 52 M. L. J. 790, 1927 (Mad.) 668). Absence of a formal order of appointment of guardian was formerly con-

4. The interest of the said Chandrabhan was adverse to that of the plaintiff in the defence of the said suit, and he was not therefore a fit person to act as the plaintiff's guardian for the said suit.

5. The said Chandrabhan did not defend the suit on behalf of the plaintiff.

6. The suit was decreed, on November 14, 1924, against the plaintiff also.

The plaintiff claims that the said decree be set aside as against the plaintiff.

No. 278—Another suit of the same kind

1. The plaintiff is a minor of 19 years of age, and sues through his next friend Ram Pratap, his uncle.

2. The said Ram Pratap was appointed a guardian of the person and property of the plaintiff by the District Judge, Meerut, by an order, dated January 4, 1920.

3. In 1922, the defendant brought a suit in this court for arrears of rent for the last three years in respect of a shop.

sidered as a fatal defect and there are some observations (which are only *obiter*) in the P. C. case (*Kunwar Pratap Singh v. Bhabute Singh*, 11 A. L. J. 901), but all the High Courts are now agreed that this is no more than a mere irregularity if the minor was in fact effectually represented. If there was no effective representation the decree will be a nullity (*Khairajmal v. Daim*, 32 C. 296, 9 C. W. N. 201, 2 A. L. J. 71, 32 I. A. 23, 7 Boml L. R. 1). The appointment of a person other than a certificated guardian as guardian *ad litem* is also a mere irregularity and not an illegality (*Dammar Singh v. Pribhu Singh*, 4 A. L. J. 155). If a minor attains majority during the pendency of the suit but no amendment is made, a decree passed against him showing him as minor is not a nullity (*Ratan Prasad v. Bridhi Chand*, 1939 (Pat.) 601, 186 I. C. 298). When any question arises as to whether a person is bound by any decree or order passed during minority, the proper test is whether he was as effectually represented in the proceedings leading to the decree or order in question as in justice, equity and good conscience to justify, in the circumstances of the particular case, the conclusion that he was party to those proceedings. (*Ramadhar Singh v. Ram Sumat Singh*, 194. (Pat.) 281).

A Civil Court cannot set aside a decree of the Revenue Court on the ground of such irregularities, though it can do so on the ground of fraud.

Result of setting aside a decree against a minor should not always be to wipe away the minor's liability altogether as that may give him an

4. The defendant proposed the plaintiff's grandmother Smt. Ram Dei as a guardian *ad litem* of the plaintiff.

5. No notice of the said proposal of the defendant was served upon the plaintiff, and the plaintiff had no knowledge of the said suit before it had been decreed.

6. The said Smt. Ram Dei was, at the time, a blind and deaf old woman of 70 and incapable of defending the suit on behalf of the plaintiff.

7. The said Smt. Ram Dei did not contest the suit and *ex parte* decree was passed against the plaintiff on November 14, 1922.

8. The rent of the said shop for the said period had been paid up by the plaintiff before the institution of the said suit and no part of it was in arrears.

The plaintiff claims that the said decree be set aside.

No. 279—Ditto, on ground of gross negligence of the guardian (x)

1. The plaintiff was born on November 20, 1908, and was a minor up to November 20, 1926.

undue advantage. The parties should be placed in the same position in which they would have been had no irregularity occurred. If a minor was sued as major, and the decree is set aside the suit should be restored after removal of the defect *Sunderlal v. Kr. Harihar Sabai*, 1937 A. L. J. 468). If there was any irregularity in the appointment of a guardian, the proceedings should commence after the removal of the irregularity and proper appointment of the guardian (*Zubar v. Mt. Mashuq*, 1926 (Oudh) 32, 88 I. C. 175; *Lakhanlal v. Sitaram*, 169 I. C. 513, 1937 (Nag.) 165; *Lokenath v. Beharee Lal*, 64 C. L. J. 497; *Monmohini Das v. Behari Shaha*, 40 C. W. N. 1135, 1936 (Cal.) 421).

(x) Almost all the High Courts, except Bombay, are agreed that if a guardian acted with gross negligence, as not setting up a valid available defence, the minor can have the decree set aside by a separate suit, although the gross negligence may not amount to fraud (*Chundura v. Rajan*, 70 I. C. 668, 45 M. 425, 1922 Mad. 273, 42 M. L. J. 429; *Ramalingam v. Venkatachalam*, 1945 (Mad.) 374; *Fazal Din v. Md. Shafi*, 10. I. C. 63 L; *Hanmantapa v. Jivabai*, 24 B. 547; *Lala Sheo Charan v. Ramnandan*, 22 C. 8; *Mahes Chandra v. Manindra*, 1941 (Cal.) 401, 196 I. C. 77.). This is the minor's substantive right which cannot be defeated merely because gross negligence is not mentioned in Sec. 44 of the Evidence Act (*Iftikhar Husain v. Beant Singh*, 1946 (Lah.) 233). For what is gross negligence, see *Mt. Siraj v. Mahomed Ali*, 138 I. C. 465,

2. On May 25, 1918, the plaintiff's mother Smt. Tulsa acting as plaintiff's guardian mortgaged to the defendant a house belonging to the plaintiff for Rs. 300 borrowed by her to provide money for her brother Ram Singh to carry on a cloth shop.

3. In 1925, the defendant brought a suit (being suit No. 205 of 1925) in this court against the plaintiff on foot of the said mortgage and the Head Clerk of this court was appointed guardian *ad litem* of the plaintiff.

4. The said Head Clerk grossly neglected his duties as such guardian by not putting forward the obvious defence that the mortgage having not been made for the benefit of the plaintiff was not binding on him, and by allowing an *ex parte* decree to be passed against the plaintiff in the said suit on November 15, 1925.

The plaintiff claims that the said decree be set aside.

1932 A. L. J. 437, 1932 (All.) 293; *Kali Charan v. Hirday Narain*, 1935 Pat. 24, *Hakim Bahauddin v. Govind Singh*, 1948 All. 117. Omission to put forward a correct defence and putting an absurd defence amounts to negligence (*Subbaratnam v. Gunavanthlal*, 169 I. C. 694, 1937 (Mad.) 472). The plaintiff must show that there was an available defence which, if raised and substantiated, would have led to a different result, and mere failure to appear and defend the suit does not amount to negligence (*Balbhadra v. Rangrao*, 1937 (Mad.) 846; *Pannalal v. Mohammed Zaki*, 1937 (Lah.) 563; *Sundar Lal v. Harihar Sahai*, 171 I. C. 36, 1937 (All.) 552). If the valid defence was raised by another defendant who fully fought out the case, the omission of the guardian to raise the same defence was held not to justify the setting aside of the decree (*Profulla Kumar v. Beharilal*, 162 I. C. 804, 1936 (Cal.) 247). But if the guardian thought honestly that there was no valid defence his omission to defend is not negligence (*Visveswara v. Surya Rao*, 163 I. C. 712, 1936 (Mad.) 440). A guardian cannot be liable for counsel's dishonesty or negligence (*Daiva v. Selvaramanuj*, 1936 (Mad.) 479). The Bombay High Court has, on the other hand, held that a decree cannot be set aside on the ground of gross negligence merely apart from fraud or collusion (*Nana Nandoo v. Daipat Supadu*, 41 Bom. L. R. 1280, 1940 (Bom.) 33, 186 I. C. 578; *Krisandas v. Vithoba*, 180 I. C. 51, 1939 (Bom.) 66, (F. B.)). In *Auraj v. Dalpat*, 1937 (Bom.) 464; it was held that in such cases the decree may be challenged in the same suit *e. g.*, under O. 9, R. 13, C. P. C. But omission to raise a doubtful plea involving great legal uncertainty, or one on which there is divergence of authorities cannot amount to gross negligence (*Venkataramamiyer v. Subramania*, 108 I. C. 639 M; *Ramalingam v. Venkatachalam*, 1945 (Mad.) 374).

No. 280—Suit by a major for having a decree obtained against him as minor set aside

1. The plaintiff was born in 1902 and was major in 1921.
2. On March 4, 1921, the defendant instituted a suit (being suit No. 548 of 1921) in this court against the plaintiff for recovery of money said to be due to him on a bond alleged to have been executed by the plaintiff's deceased father Ramlal.
3. The defendant described the plaintiff in the said suit as a minor, and obtained an order for the appointment of one Prem Narain as guardian *ad litem* of the plaintiff.
4. The said suit was decreed *ex parte* on July 20, 1921.
5. The plaintiff had no notice of the said suit or the said decree until February 4, 1923, and could not therefore defend it.
6. The said suit was false, as the bond on which it was based had been satisfied by the plaintiff's deceased father in his lifetime.

The plaintiff claims that the said decree be set aside.

Facts showing gross negligence must be alleged. If it consists in not setting up a valid defence, the plaint should show the defence which was valid and available.

A decree obtained against a minor, where the guardian appointed by the Court has been guilty of gross negligence, is not void but is merely voidable. (*Rameshwar Prasad v. Ram Chandra Sharma*, 6 D. L. R. (A) 79, A. I. R. 1951 All. 372, 1950 A. L. J. 719 (F. B.).

A decree against a minor is void *ab initio* and a nullity, if it is passed in a suit in which no guardian is appointed for the minor or the appointment of the guardian is invalid or the validly appointed guardian does not properly represent the minor. To avoid such a decree it is not necessary to file a separate suit. It can be assailed in any proceeding whatsoever where this question may be relevant provided it is shown that the minor was not represented in the suit. (*Inderpal Singh v. Sarnam Singh*, A. I. R. 1951 All. 823, 1951 A. W. R. (H. C.) 91).

Limitation : Was six years under Art. 120 from the date when negligence comes to plaintiff's knowledge (*Basavayya v. Majeti*, 30 L.W. 911), but is now 3 years under Art. 113.

No. 281—Suit for setting aside a certificated guardian's transfer (y)

1. The plaintiff was born on January 20, 1901, and therefore attained majority on January 20, 1922.

2. One Raghbir Singh was appointed guardian of the plaintiff's property by order of the District Judge, Kanpur.

3. The plaintiff was the owner of the property detailed at the foot of the plaint.

(y) A transfer made by a *de jure* or legal guardian, e.g., a natural guardian, such as a Hindu mother, is considered to be the act of the minor and is valid until it is set aside at the instance of the minor. (*Monmohan v. Bidhu Bhusan*, 185 I.C. 6, 1939 (Cal.) 460). The transfer would be set aside if it was not made for a legal necessity or for the benefit of the minor or his estate. The transferee has to prove the necessity or benefit. He can also succeed if he can show that he had made *bona fide* inquiries and had satisfied himself of the existence of the necessity. But if the transfer is made not by a *de jure* guardian but by any other person, even if that other person be the *de facto* guardian or manager, it is, according to Muhammadan Law, the act of an unauthorized person and is absolutely void and cannot be sustained even if there was any necessity for the transfer (*Imambandi v. Mutsaddi*, 47 I. C. 513, 45 C. 878, 35 M. L. J. 422, 16 A. L. J. 800, 28 C. L. J. 409, 23 C. W. N. 50, 20 Bom. L. R. 1022; *Fatch v. Gurmukh*, 10 L. 385, 113 I. C. 227, 1929 (Lah.) 810; *Mohammed Sultan v. Abdul Rahman*, 171 I. C. 876, 1937 (Rang.) 175; *Mohammad Moizuddin v. Nslini Bala*, 1937 (Cal.) 284; *Karam Chand v. Vali Mohd.*, 170 I. C. 310, 1937 (Sind.) 157; *Karim Khan v. Jaikaran*, 170 I. C. 543, 1937 (Nag.) 390; *Sambhlu v. Piyari*, 1941 Pat. 351, 193 I.C. 253). The Allahabad High Court has held that such a transfer cannot be validated even by minor's ratification on attaining majority (*Anto v. Reoti Kuer*, 1936 (A. L. J.) 1099, 1936 (All.) 837 (F. B.)). It has been held in a case in Peshawar that such a transfer is voidable at the minor's option (*Jawahir Singh v. Municipal Committee, Kohat*, 170 I. C. 63, 1937 (Pesh.) 74). The same view was taken in the case of a Hindu guardian also in *Nalanmad v. Kanbirampore*, 84 I. C. 937, 1925 (Mad.) 260, but in the later cases of *Ramasami v. Kasinath*, 108 I. C. 529, and *Purshottam v. Brindavana*, 1133 I. C. 773, 1931 M. W. N. 417, 1931 (Mad.) 597, the Madras High Court has on the authority of the Privy Council, *Hanuman Pande v. Babooe*, 6 M. I. A. 393, held that under the Hindu Law the transfer of even a *de facto* guardian would be binding if for the benefit of the minor and otherwise fair. The same view has been held in Patna (*Nokhe Lal v. Rajeshwari*, 1936 (Pat.) 677, 165 I.C. 213; *Gundichi v. Balaram*, 1940 (Pat.) 661). The position has, however, been changed under the Hindu Minority and Guardianship Act, 1956, Section 11 of which provides that after the commencement of that Act a *de facto* guardian of a Hindu minor is not entitled to dispose of or deal with the property of a minor. Sale in consideration of barred debt is not binding (*Thadavarthi v. Myreni*,

4. The said Raghbir Singh sold the said property to the defendant on October 20, 1919, with the permission of the District Judge, Kanpur.

5. The said permission was obtained by the said Raghbir Singh by a false representation that money was required to pay off two debts said to be due from the plaintiff's deceased father to Pran Sukh and Ratan Lal respectively. The plaintiff's deceased father had not taken any loans from Pran Sukh or Ratan Lal and nothing was therefore due to them or either of them from the plaintiff. No part of the consideration of the sale of the said property was applied to the plaintiff's benefit.

The plaintiff therefore claims—

- (1) that the said sale be set aside,
- (2) possession of the property,
- (3) mesne profits from date of suit to the date of possession.

1946 (Mad.) 198). The transfer made before the Art. 32 of 1956 by a *de facto* guardian without necessity will, according to this view, be voidable and not void (*Addeyya v. (Govinda)*, 58 M. L. J. 417, 1930 M. W. N. 97). But the Patna High Court had held that this does not mean that it would be binding until set aside but means only that it is not binding though the minor may choose to ratify it *Kailash v. Rajani*, 1945 (Pat.) (298). The Lahore High Court has held that after transfer of possession of property the contract of lease could be assailed on the ground that the lessor was minor and his guardian had no authority to grant the lease (*Om Prakash v. Daulat Ram*, 1930 (Lah.) 772). The act of a certified guardian is regarded as that of *de jure* guardian or any authorized person only if he has acted with the permission of the court. It has been held in a case that the alienee is protected by the order of the court and is not bound to make any other inquiries unless it can be shown that the sanction was obtained by fraud or underhand dealing and that the alienee was a party thereto (*Benares Bank Ltd. v. Dip Chand*, 160 I. C. 64, 1936 (All.) 172; *Brij Raj v. Alliance Bank of Simla*, 1936 (Lah.) 946; *Balaji v. Sadashiv*, 165 I. C. 530, 1936 (Bom.) 389; *Abbas Husain v. Kiran Shashi*, 1941 N. L. J. 447). Though the necessity should be recited in the court's sanction mere omission of it cannot be pleaded to invalidate the sanction (*Balaji v. Sadashiva*, *Ibid*). But it has been held in a case that if the transferee is the creditor who ought to know the facts, the burden will be on him to justify the transfer (*Rajab v. Bishen Prasad*, 15 P.L.T. 787). If he has made a transfer without such permission or in contravention of the permission, his act is the act of an unauthorized person and is not binding on the minor (*Sec. 30, G. and W. Act; Abbas Husain v. Kiran Shashi*, 1941

No. 282—Suit for setting aside a natural guardian's transfer

1. The plaintiff was born in October, 1904, and attained majority in October, 1922.

2. The plaintiff was the owner of the property detailed at the foot of the plaint.

3. On November 20, 1917, Smt. Raj Kali, mother and natural guardian of the plaintiff, executed a sale-deed in respect of the said property in favour of the defendant and the defendant has been in possession of it ever since.

4. The said sale was not made for any legal necessity or for the benefit of the plaintiff.

Relief, as in the previous Precedent.

N.L.J. 447, 1942 (Nag.) 12). It is not void in the sense that it can be treated as a nullity by any person, but it can be treated as a nullity *at the option of the minor*, and need not be set aside by him within three years under Art. 91 (*Nagendra v. Mobini*, 34 C. W. N. 948) (now see Art. 60 of the Act of 1963). A plaintiff in such a case should restore the benefit which he has received under the transfer before the transfer can be set aside (*Jai Narain Lal Tandon v. Bichoo Lal*, I.L. R. 1938 All. 614, 1938 A. L. T. 521, 176 I. C. 369, 193 (All.) 369, 938 (A. W. R.) (H. C.) 343, 11 R. A. 81; *Abbas Husain v. Kiran* (*ibid.*, *Gondulal v. Abdus Sattar*, 1948 Nag. 353). But if it cannot be shown that he had been benefited by the purchase money, no order of refund should be made (*Venkatarama v. Sobhandri*, 40 C. W. N. 545, 161 I. C. 29, 1936 (P. C.) 91). Defendant is not however, entitled to interest on the money ordered to be refunded and plaintiff is entitled to receive profits from the date of sale (*Rahima v. Amathul*, 161 I. C. 522, 1936 (Mad.) 140). Cases can be conceived in which court will not in its discretion allow refund, *e. g.*, when transferee was cognizant of the minority and the minor was not guilty of fraud or misrepresentation, (*Mt. Bachai v. Hayat Mahammad*, 1940 (Oudh) 119). But if transfer is made by a relation who cannot be a natural guardian and who is neither a certificated guardian nor a *de facto* guardian as he neither lived with the minor nor managed his property, the transfer is void as he had no authority to make it (*Kalipada v. Purnabala*, (1948) Cal. 269).

There is also a difference between the remedies of the minor in the two cases. If the transfer was by an authorized person, *e. g.*, by a natural guardian or by a certificated guardian acting under permission, it is considered to be the act of the minor himself, and the minor must bring a suit to have it set aside within three years of attaining majority (Art. 60), before he can recover the property. He cannot be permitted to succeed in a suit for possession, treating the transfer as nullity, brought after three years (*Fakiratpa v. Lumana*, 44 B. 742, *Labba Mal*

No. 283—Suit for property transferred by a de facto guardian

1. The plaintiff was born in April, 1903, and was a minor in 1917.

2. During the minority of the plaintiff, Muhammad Baksh, an uncle of the plaintiff, used to manage the plaintiff's property.

3. The property detailed at the foot of the plaint belonged to the plaintiff.

4. On March 14, 1917, the said Mohammad Baksh wrongfully made a usufructuary mortgage of the said property in favour of the defendant who has been in possession ever since.

5. The net profits of the said property, as shown in the account given at the foot of the plaint, are Rs. 475 a year.

The plaintiff claims—

(1) Possession of the said property.

(2) Rupees 1,425 on account of mesne profits for the last three years.

(3) Future mesne profits from the date of suit to that of possession.

v. *Malak Ram*, 1925 (Lah.) 620; *Babu Ram v. Saidunnisa*, 11 A. L. J. 783). But if the transfer was made by an unauthorized person or by a certificated guardian without, or in contravention of, the permission of the District Judge, the transfer can be treated by the minor as nullity and a suit could be brought by him for possession, without a prayer for having the transfer set aside, within 12 years provided by Art. 144 (*Matadeen v. Ahmad Ali*, 9 A. L. J. 215 (P. C.); *Imambandi v. Mustsaddi*, 16 A. L. J. 800 (P. C.), 1926, (Nag.) 124; *Rahman v. Sukh Dayal*, 2 A. L. J. 567; *Mahadeo v. Sanaji*, 99 I. C. 1050, 1927 (Nag.) 145; *Ponnammal v. Gomathi*, 165 I.C. 287, 1936 (Mad.) 884) (now see Art. 65). The Allahabad High Court has, however, held that even a natural guardian's transfer can be treated as nullity and a suit for possession can be brought within 12 years (*Bachan Singh v. Kamta Prasad*, 7 A. L. J. 33; *Lallo Singh v. Jamna Prasad*, 1940 (All.) 320, 189 I. C. 372). **The plaint must specify the exact position of the person who had made the transfer and must allege facts showing how his act is not binding on the plaintiff.** Where the transfer is voidable and not void the plaintiff

No. 284—Suit for property transferred by a certificated guardian without permission

1—3. Same as in previous Precedent.

4. The said Raghubir Singh usufructuarily mortgaged the said property to the defendant by a mortgage-deed, dated October 20, 1917, without the permission of the District Judge.

(Or, in contravention of the permission granted by the District Judge : the District Judge had permitted a usufructuary mortgage for Rs. 5,000 for 7 years on the condition that the principal and interest should be satisfied within that period. The said Raghubir Singh made the mortgage for Rs. 5,000 without any fixed term at an interest of 14 annas per cent per annum).

5. The plaintiff repudiated the said mortgage by a registered notice sent to the defendant on March 10, 1924.

The plaintiff claims—

(1) Possession of the said property.

should pray for its cancellation also and not merely for a declaration of its invalidity (*Varadachar v. Dasappa*, 14 Mys. L. J. 256.)

Mesne profits : If the transfer was made by wholly unauthorized person, the plaintiff can recover mesne profits up to a maximum period of three years. But if it was made by a legal guardian, they can be claimed from the date of repudiation. If there was no repudiation prior to suit, he can get profits from the date of suit only (*Bhirgu v. Nar Singh*, 14 A. L. J. 1161). A transfer by a certificated guardian without permission is only voidable at the option of the minor (Sec. 30), hence the latter can claim profits only from the date of repudiation. The transferee can get compensation for improvements if made before he had notice of repudiation (*Venkataraman v. Ponnusami*, 106 I. C. 131, 1927 (Mad.) 1023; contra *Bechu v. Bhabuti*, 124 I. C. 731).

Limitation is three years under Art. 60 from the date that minor attains majority, whether the guardian is appointed by court or not (*Dipchand v. Munnialal*, 27 A. L. J. 1248, 1929 (All.) 879). This will be so in all cases when the transfer is not void even though there is no prayer for setting aside the sale (*Sri Raja Sobhanadri v. Raja Muganti*, 129 I. C. 245, 1931 (Mad.) 45, 1930 M. W. N. 1067, 60 M. L. J. 701, 54 M. 352). In case of several Hindu minor sons of mother who had made the transfer, a suit brought more than 3 years after the eldest son attaining majority was held to be barred as the eldest being manager could sue for all (*Annia Pillai, In re*, 165 I.C. 656, 1936 (Mad.) 914). A suit to recover property conveyed under a transfer which is void e. g.,

(2) Rs. 1,600 on account to mesne profits for 2 years, from March 10, 1924, at Rs. 800 a year.

(3) Future mesne profits.

No. 285—Suit against minor's property for price of necessities supplied to the mother (aa)

1. The defendant is a minor.

2. Between October 18, 1928 and November 20, 1926 the plaintiff supplied to the defendant at his request various commodities, the particulars of which with their prices are fully set out in Schedule A appended to the plaint, which should be deemed to be part hereof.

3. The commodities mentioned in the preceding paragraph were articles of daily necessity of the defendant and his wife and were suited to the defendant's position and condition in life.

4. Out of the price of the said commodities the defendant has paid Rs. 260 only and Rs. 790 are still due from him as per account given in the said Schedule A.

5. The Government revenue of villages Radauli and Charka belonging to the defendant for *Kharif* 1336 Fasli fell into arrears and the movable property of the defendant was attached by the Tahsildar. The Plaintiff advanced Rs. 300 to the defendant on January 30, 1919, for payment of the said government revenue.

transfer by a *de facto* guardian without necessity is governed by Art. 144 (*Kailash v. Rajani*, 1945 (Pat.) 298) now Art. 65.

(aa) Such a suit lies under Sec. 68, Contract Act. The "necessaries of life" mentioned in that section are not restricted to the elementary necessities such as food and clothing but include other pressing-necessities, *e. g.*, payment of government revenue (*Mohammed Ali v. Chinku*, 1930 (All.) 128), meeting the expenses of the marriage of the minor himself or of any one whom he is legally bound to maintain and get married (*Pathak v. Ram Din*, 2 Pat. L. J. 627). The term has been held to include also cash needed to effect repairs in minor's house (*Ramchandra v. Hari*, 1936 (Nag.) 12), or to perform necessary religious ceremonies (*Maharam v. Vadilal*, 20 B 61), or cost incurred in defending a suit to save minor's property (*Watikins v. Dhunnoo*, 7 C. 140); or in defending himself in a criminal prosecution (*Sham v. Choudhri*, 21 C. 872); or providing a house for living and continuing his studies (*Kunwarlal v. Surjmal*, 1963 M. P. 58). Advances made for the marriage of a Hindu male minor would be a necessity (*Kalicharan Ram v. Ram Devi Ram*, 1917

The plaintiff prays for a decree for the recovery of Rs. 1,090 with costs and interest at 12 per cent per annum from date of suit, from the movable and immovable property of the defendant.

No. 286—Ditto, on the basis of contract by his guardian (bb)

1. The plaintiff is the widow of one X, a Hindu governed by the Mitakshra School of Hindu Law who died in 1920, leaving his son Y.

2. The said Y died in 1925, leaving a widow, and before his death gave her authority to adopt a son.

3. The said widow adopted the defendant as a son.

4. The defendant was on the date of adoption a minor and continued to be so upto the 1st of October, 1920.

5. During the defendant's minority his natural father Z acted as the guardian of his property.

6. On the 20th October, 1936, the said Z acting as such guardian executed a deed of maintenance in favour of the plaintiff, agreeing on behalf of the defendant to pay her a maintenance allowance of Rs. 50/- per month.

7. The defendant has not paid the plaintiff anything on account of maintenance since he has attained majority and three years allowance from the 1st October, 1938, is in arrears.

The plaintiff claims Rs. 1,800/- with interest from date of suit from the estate of the defendant.

Pat. 332). Similarly marriage of a minor Muslim girl is a necessity that would come within the purview of Sec. 68 (*Rahima Bibi v. A. K. Sherfuddin*, 1947 Mad. 155).

Defence : That he did not need the money or that the guardian did not apply it to his needs.

(bb) Ordinarily a guardian has no power to bind a minor by a purely personal contract, but if by such contract the guardian incurs an obligation for which the estate of the minor already liable under the personal law, such contract can be enforced against the minor's

No. 287—See precedent No. 247-A
TRUSTS

No. 288—Suit for execution of Trusts

(Form No. 44, Appendix A, C. P. C.)

1. He is one of the trustees under an instrument of settlement, bearing date on or about the day of , made upon the marriage of E. F. and G. H., the father and mother of the defendant [or an instrument of assignment of the estate and effects of E. F. for the benefit of C. D., the defendant, and the other creditors of E. F.].

2. A. B. has taken upon himself the burden of the said trust and is in possession of [or of the proceeds of] the movable and immovable property conveyed [or assigned] by the before-mentioned deed.

3. C. D. claims to be entitled to a beneficial interest under the before-mentioned deed.

4. The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said, or of part of the said, immovable or movable property, or the proceeds of the sale of or of part of the said movable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust-estate may be administered in the Court for the benefit of the said C. D., the defendant, and all other persons who may be interested in such administration, in the presence of C. D. and such other persons so interested as the Court may direct, or that the said C. D. may show good cause to the contrary.

[N. B.—Where the suit is by a beneficiary, the plaint may be modelled, *mutatis mutandis*, on the plaint by a legatee viz. Precedent No. 246.]

estate. For instance, if a minor is liable for maintenance of his mother, a guardian's contract to pay for a maintenance allowance can be enforced against his estate (*Kondpali v. Putta*, 1943 (Mad.) 487, 1943 M. W. N. 266). see, the recent Calcutta case relating to reconveyance of minor's property- *Radheysbyam Kamila v. Smt. Kiran Bala Devi* A.I.R. 1971 Cal. 341.

No. 289—Suit under Sec. 92, C. P. C. (cc)

1. The defendant No. 1 dedicated the property detailed in Schedule A attached to the plaint, by a deed of trust dated July 4, 1957, in trust, for the following charitable objects :—

(1) Establishing and maintaining a national and technical school at Jaunpur;

(cc) A suit under this section can be brought only with the written consent of the Advocate-General, whose functions are exercised, outside the Presidency towns by Collectors or other officers nominated by the State Government, in places where there is no Advocate-General (Sec. 93). But such Collectors and other officers can grant such sanction only with the previous permission of the State Government and such permission must be obtained by such officer in every case as a general permission or delegation of authority is not contemplated (*Gulzarilal v. Collector of Etah*, 1931 P. C. 121). The granting of such a sanction is an administrative and not a judicial act (*Bhasker, Ak. v. Adv. Gen.*, 1960 Ker. 90 F. B. following 1956 S. C. 53). Sanction once given cannot be revoked. (*Desraj v. Jamuna*, 1962 J. & K. 86, relying on 1958 S. C. 1018). All the persons to whom permission has been given must join as plaintiffs. The Supreme Court has held that it is a joint authority and must be acted upon jointly. If one of the persons to whom sanction has been given dies a suit by the rest is incompetent and fresh sanction must be obtained (*Narain Lal v. Sundar Lal* A. I. R. 1967 S.C. 1540). The legal representatives of the deceased plaintiff cannot be brought on records. (*Bishambhar Nath and another v. Raghunath Pd. Sharma* A. I. R. 1971 All. 207). Appeal must also be filed by all, in spite of O. 41, R. 4 (*Muhamad Ishaq v. Muhammad Husain*, 100 I. C. 838 L.). No one who has not received permission of the Advocate-General can join as a plaintiff, but a person interested in the subject of litigation can apply to be made a defendant and his application cannot be refused on the ground that he has not obtained permission to sue (*Dooply v. Moolla*, 103 I. C. 261, 5 R. 263, 1927 (Rang.) 186). Fresh sanction is not necessary if the scope of the suit is not enlarged by amendment of plaint or addition of a new party (*Gori Bibi v. Sarasmed*, 1929 (Mad.) 635; *Gobind Chunder v. Abdul Majid*, 1944 (Cal.) 163). If one of the two plaintiffs dies and a new plaintiff is brought on record in his place, the leave in favour of the deceased plaintiff enures for the benefit of the new one (*Champaklal v. Bai Narbada*, 1945 (Bom.) 74). Addition of a defendant has been held to enlarge the scope of the suit (*Jessinghbhai v. Jivatlal*, 1947 Bom. 487, 49 Bom. L. R. 428). But any suit which is outside the scope of this section may be brought by anyone in his private capacity or under O. 1, R. 8, C. P. C. The scope of the section should, therefore, be clearly understood. It applies when (i) the suit is not only in the interest of the plaintiff individually but in the interest of the public or in the interest of the trust itself; (ii) the suit relates to a trust for a

(2) maintaining the temple known as the Seth's temple at Jaunpur, and defraying the expenses of *bhog* of the idol and the pay of the temple servants; and

(3) paying a one-fifth portion of the net income of the said property to the Hindu orphanage at Varanasi.

public purpose of a charitable or religious nature; (iii) a breach of trust has been committed or directions of the court are deemed necessary for its administration; and (iv) one or more of the reliefs mentioned in Sec. 92 is sought. Relief (b) is a general relief, but it should be *ejusdem generis* with the other reliefs. A relief directing account to be taken of the trust income and payment of the amount found due can be claimed (*Thushtu v. V. Krishnamurthi*, 100 I. C. 841, 52 M. L. J. 182, (1927) M. W. N. 202, 38 M. L. T. 143), but it is not obligatory on the court to direct accounts on the removal of a trustee (*Faizunnessa v. Moulvi Asad*, 41 C. W. N. 298). No sanction under Sec. 92 is necessary in the case of a *private wakf* such as a *wakf-ala-ul-avlal* which provided expenditure of 6 pies in the rupee in "good deeds and charity" (*Md. Shafiff v. Md Mujtaha*, 111 I. C. 93, 26 A. L. J. 1016, 1928 (All.) 660); see contra I. L. R. 1950 All. 985). A suit for *mere declaration that a property is* trust property or that the plaintiff is the trustee or is entitled to act as *Mutwalli* is not covered by Sec. 92 (*Jamal-ul-din v. Mujtaha*, 25 A. 681; *Badri Das v. Chunni Lal*, 33 C. 789; *Ram Das v. Hanumantha*, 36 M. 364; *Miram Baksh v. Allah Baksh*, 99 I.C. 756 L; *Abdul Rahim v. Mahomed Barkat*, 55 C. 519; *Ram Rup v. Sarm Dayal*, 160 I.C. 289, 1936 (Lah.) 283; *Shadi Ram v. Ram Kishan*, 1948 (East Punjab) 49), *Mt. Khurshid Jahan v. Ram Qamali*, 1947 Oudh 17, nor a suit for declaration of the validity of a trust (*Hafiz Mahomed v. Swarup Chand*, 1942 (Csl.) 1), nor a suit for ejectment of a trespasser from the trust property (*Acharya Gur v. Ramdhari*, 1925 (All.) 683, 23 A. L. J. 601 (O. R. M. O. M. S. P. Firm v. P. L. N. R. M. Nagappa, 1941 (P. C.) 1, 192 I. C. 1; *Govind Chunder v. Abdul Majid*, 1944 (Cal.) 163) (Disputed questions of title cannot be gone into in such a suit, *Kalimala v. Mukerji*, 1962 S. C. 1329); nor a suit for account by one trustee against another (*Sanmukhan Chetty v. Govinda Chetty*, 1937 M. W. N. 849; *Gurunathsami v. Alangaram* 1939 Md. 594, *Balkishan Das v. Parmeshwari Das*, 1963 Punj. 187) or by trustees against past trustees (*Indu Bhushan v. Kiron Chandra*, 1940 (Cal.) 376, 44 C. W. N. 327), nor one for an injunction restraining the defendant from dealing with *waqf* property in manner opposed to the intention of the founder of the trust (*Nibal Shah v. Malan*, 99 I. C. 755, 2 L. L. J. 457), nor a suit for a declaration that the plaintiff is entitled as founder of the trust to appoint new trustees in place of deceased trustees (*Ruggan Prasad v. Bhanno*, 99 I. C. 1045 A.), nor a suit by the idol through a worshipper for declaration of title and possession of trust property even if shebait is acting adversely to the interest of the idol (*Bishan Nath v. Thakur Radhe Ballabhji* A. I. R. 1967 S. C. 1044). Nor a suit by certain persons on behalf of villagers for a declaration that an alienation by the *pujari* is void (*Sri Veerobhardraswami v. Maya Kone*, 1940

2. By the said deed of trust, the said defendant No. 1 appointed himself and defendants Nos. 2-10 as trustees for carrying out the objects of the said trust and appointed himself as the managing trustee.

Mad. 81); nor a dispute between beneficiary and the trust (*Mt. Shabjeahan v. Ibn Ali*, 1954 (All.) 69). But when, on the death of trustees nominated by the creator of trust an adverse claimant takes possession of trust property and repudiates the trust, a suit for appointment of new trustees and for settling a scheme of administration is maintainable (*Eralappa v. Bala Krishnah*, 102 I. C. 74). But if a declaration is involved in the other reliefs the same can be given, e.g., in a suit to which alienee of trust property is impleaded, a declaration that the alienation is void may be made along with the decree removing the trustees and appointing new one. (*Munia v. Lachman Prasad*, 1925 (All.) 759; *Mufti Ali Jaffir v. Fazal Husain*, 20 A. L. J. 557), a declaration that the property is trust property can be granted against creditors of the trustees or transferees of the alleged trust properties claiming the property in their own right, though ordinarily no relief should be granted to third parties in a suit under S. 92 (*Janki Pd. v. Kubher Singh*, 1963 All. 187). But a relief for ejectment of a lessee cannot be claimed. (*Fayunessa v. Moulvi Assad*, 41 C. W. N. 298). In a suit for settlement of a scheme for a *dargah*, the *Mutwalli* in management is necessary party (*Gori Bibi v. Sarasamed*, 1922 (Mad.) 653), and also a near relation of the founder of the trust eligible under the terms of the trust to be a trustee (*Lal Suresh Singh v. Legal Remembrancer to Govt., U. P.* 1937 (Oudh.) 229, 167 I. C. 828). It has been held that a relief for a declaration that a property is a public charitable property and for an injunction restraining the defendant from alienating it is covered by Sec. 92(b) (*Mulchand v. Devigir*, 165 I. C. 158, 1936 (Sind.) 179). A suit for the removal of a self constituted trustee on the ground of misconduct and misappropriation is one within Sec. 92 (*Ramdas v. Kishna Prasad*, 1940 (Pat.) 425). A suit under Sec. 92 cannot be converted into a suit for possession against a trespasser or stranger, but a suit will lie against trustee *de nov tort* provided they do not claim to hold adversely to the trust but purport to be administering the trust (*New Lovhy v. Gulam Hussain* I. L. R. 1950 (Nag.) 50). A suit can also be brought under this section for removal of a *mahant* both from trusteeship of property and also from spiritual duties if the two duties are interdependent and inseparable (*Satish Chandra v. Dharnidhar*, 1940 (P. C.) 24). A suit to compel trustees to cease spending *Wakf* income on secular objects and to apply entire income to religious purposes is within Section 92 (*Haji Md. Nabi v. Province of Bengal*, 1942 (Cal.) 343). A suit for revision of a scheme sanctioned by a decree under this section must be brought under this section and not independently (*Baba Surajgir v. B. Brahma Narain*, 1946 (All.) 148).

There is, however, a great conflict of opinion on the question of relief about wrongful alienation by a trustee and the suit should be framed after studying the rulings of the local High Court and in accordance with its views.

3. The defendant No. 1 has, since the date of trust, been in possession of the said property as such managing trustee, but has not applied any part of the income to any of the objects of the said trust but has appropriated the whole of it to his own use. The other defendants have taken no steps to compel the defendant No. 1 to carry out the objects of the said trust.

The word "interest in the trust" in S. 92 of the C. P. Code must be interpreted to mean some such interest which is affected by Mismanagement so that the person is interested in having affairs of the trust set right by court.

It was held that a *Shia* of the place where the *wakf* property was situate who had been taking part in the various functions like the *majlises*, *astari*, etc. held in that place was entitled to bring a suit under S. 92 C. P. C.

Where a Mussalaman makes a *wakf* known as *wakf-ul-aulad* with the ultimate benefit reserved for a public purpose even though the public may have no chance of being benefited while anyone in the family of the *wakif* is alive, it will be difficult to hold that the *waqf* is a private *wakf*. It would be a public trust in respect of which a suit could be filed under Sec. 92, C. P. Code (*Farmen Ali Khan v. Mohd. Raja Khan*, I. L. R. (1950) All. 985). Sec. 92 C. P. Code governs suits brought by individuals as representatives of the general public and claiming any of the reliefs specified in the section, and for such suits the sanction of the Advocate-General is a condition precedent. But suits brought by one or more of the trustees merely for the purpose of vindicating their private rights as trustees and for enabling them to discharge their duties and liabilities as trustees do not fall under the section and for such suits no sanction is needed. The nature of the relief claimed in the suit and the capacity in which the plaintiffs are suing have both to be taken into account in determining whether the suit is one falling within S. 92.

Where the suit as laid is in a representative capacity and for the advancement of the interests of the trust and not for a vindication of the personal or individual rights of the plaintiffs the suit is one falling under S. 92 and sanction is absolutely essential. The mere fact that the plaintiffs claim to be trustees entitled to be in management of the affairs of the trust will not take the suit outside the scope of S. 92, and the absence of sanction under the section is fatal to the maintainability of the suit. (*Vannia Erumal Pillai v. Sivasubramania*, A. I. R. 1952 T. C. 323).

In a suit under S. 92 C. P. C. the plaintiffs claimed that a certain house was a public religious trust of the Jain Community and based their claim on the following facts:—(1) that the property was acquired by Jain Pujs; (2) that the property had always been held by the Pujs

4. By a deed of sale, dated January 14, 1959, defendant No. 1 has wrongfully sold as his private property the house in Jaunpur detailed in Schedule B attached to the plaint, being part of the trust property specified in Schedule A, to defendant No. 11.

and was known to be an upasara; and (3) that the property had devolved from Guru to Chela.

Held, that the circumstances set out above were wholly inconclusive and did not show that the house in question was a public religious trust. (*Panna Lal v. Puj Harsh Rishi*, A. I. R. 1952 Punj. 361).

The essential feature of a public trust which is contemplated by S. 92 C. P. C. is that the endowment must be for a public purpose of a charitable nature and that the beneficial interest in it must be vested in the public in general or in a considerable section of the public. Such endowments are meant to last for ever and once the trust is established it would no longer be open to the founders or the trustees to divert the income of the trust property either to their own private use or to any purpose other than that for which the endowment was made. In the case of private trusts on the other hand, the beneficial interest would be vested in one or more ascertainable individual. The trust itself may be for a limited purpose or for a limited period. (*Vannia Pillai R.D. v. Shiva Subramonia*, A. I. R. 1952 T. C. 323). See A. I. R. 1967 A. P. 181 for difference between public and private trusts.

If a fund is for the use of villagers, that is, for purposes connected with the village community, as a whole or with a substantial part of the village community, whatever may be the nature of the purpose to which it might be utilized, the trust must be said to be one of a public charitable nature. A suit for directing the persons in charge of the fund to render an account falls under S. 92, Civil Procedure Code (*Kasi Viswanadhan v. Rudraviranna*, (1952) 2 M. L. J. 443).

A cotrustee who is being excluded from management and from whom all information as to management of trust is withheld, can sue his fellow trustees under the ordinary law to enforce his rights as cotrustee. A suit by him does not necessarily fall under Sec. 92, C. P. C. by the circumstance that the substantive relief he claims is termed "Relief for account". The co-trustee can obtain this remedy without the sanction of the Advocate-General. (*Balkishan Dass v. Parmeshwari Dass*, A. I. R. 1952 Punj. 386).

A suit under S. 92, C. P. C. is a suit of special nature which presupposes the existence of a public trust of a religious or charitable character. Such a suit can proceed only on the allegation that there is a breach of such a trust or that directions from the Court are necessary for the administration thereof and it must pray for one or other of the reliefs that are specifically mentioned in the section (*Gbeevergheshe Kosby v. Chacko Thomas*, 1963 Ker. 191; *Sanat Kumar Mira v. Hem Chandra*

5. Plaintiff No. 1 is the *pujari* of the said Seth's Temple at Jaunpur, and plaintiff No. 2 is the manager of the Hindu orphanage at Varanasi and as such both have an interest in the said trust and have obtained the consent in writing, dated March 4, 1960, from the Advocate-General, U. P., for the institution of the suit for the reliefs claimed.

1961 Cal. 411). A suit for declaration that certain property appertains to a religious trust may lie under the general law but is outside the scope of S. 92, C. P. C.

Where in a suit brought under S. 92, C. P. C. the defendant denies the existence of the trust and denies further that he was guilty of misconduct or breach of trust and it is found by the courts that the allegations of breach of trust are not made out, and it is not the case of the plaintiffs that any direction of the Court was necessary for proper administration of the trust, the very foundation of a suit under S. 92 becomes wanting and the plaintiffs have no cause of action for the suit they instituted. In such a case, a finding about the existence of a public trust is wholly inconsequential and as it is unconnected with the grounds upon which the case is disposed of it could be made a part of the decree or final order in the shape of a decree in favour of the plaintiffs.

When the defendant denies the existence of trust a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section. If the plaintiff fails for want of a cause of action there is no warrant for giving him a declaratory relief under the provisions of S. 92, C. P. C. (*Mahant Pragdas Ji Gurn v. Isbwar Lalbhai Narsibhai*, A. I. R. 1952 S. C. 143).

It is not easy to lay down a criteria (in the absence of a written documents) for constituting a public trust. Mere public user or certain acts of charity were not taken to infer a public Trust *Bihar State Board of Religion Trust v. Mahant Shri Bisheshwar Das* A. I. R. 1971 S. C. 2057. Certain tests, were, however laid down by S. C. in the case of *Goswami Shri Mahalaxmi Vebhariji v. Shab Ramchordas* A. I. R. 1960 S. C. 2030-31. In the case of a public endowment, it is the shebait alone who can represent the deity to bring a suit for recovery of possession of the properties improperly alienated by a shebait; other members of the public have got only the remedy under the provisions of S. 92, C. P. C. or under S. 54 of the Orissa Hindu Religious Endowments Act for removal of the trustee guilty of mal-administration and for the appointment of a new trustee who alone can represent the deity. Any other person, however, interested he may be in the endowment, is not entitled to represent the deity in such a suits (*Artatran Alekhagadi Bramba v. Sudersan Mohapatra*, A. I. R. 1954 Orissa 11).

A scheme once settled by the court cannot be altered even by the Court except only on substantial grounds (*Abmad Adam v. M. E. M. Makebri*, 1964 S. C. 107). It is true that changes in times and circum-

The plaintiffs pray for a decree—

(1) Declaring that the sale of the said house in favour of defendant No. 11 is null and void.

(2) Removing the defendants Nos. 1-10 from the office of trustees.

(3) Appointing new trustees and vesting the trust property in them.

stances may *ex debito justitii* require that alterations should be made in the scheme to carry out the objects of the endowment and to see that the scheme operates beneficially. No separate suit is necessary for making such alterations. The same can be made by an application where the scheme originally settled contains a clause to that effect. (*Raje Anandrao v. Shamurao*, 1961 S. C. 1206.). At the same time the Court has always to exercise caution in this matter and to see that what has been done by the Court is not disturbed except when there are substantial grounds for doing so and where satisfactory evidence to sustain those grounds is brought before the Court. The paramount consideration must, of course be the interest of the charity. (*Shrinivas R. Acharya v. Purshottam Chatarbhuj*, 55 Bom. L. R. 497).

It is not necessary that for every suit under S. 92 there must necessarily be a trustee who can be sued as a defendant. If a trust has been created for public purposes of a charitable or religious nature under a will, a suit will lie for settling a scheme where the direction of the Court is deemed necessary for the administration of such trust. The person who is in possession of the property will be a proper party to the suit. (*Peria Annapurna Guru v. Collector of Vizagapatam*, 1953 Mad. W. N. 457).

A suit under section 92 is considered to be a representative suit and a decree in it is binding on all persons who have the same interest as the plaintiff and are deemed to have been represented by the plaintiff. If a decree is passed under S. 92, it may become necessary to examine the plaint to decide in what character the plaintiff had sued and what interests he or they had claimed. Similarly, the pleas taken by the defendant will have to be examined with a view to decide which interest they purported to defend in common with others. (*Raje Anandrao v. Shamurao*, supra; *Ahmad Adam v. M. E. Makbri*, supra).

The trustees mentioned in S. 92 need not be *de jure* trustees. *De facto* trustees will sufficiently attract the operation of the section. (*Setya Chran Sarkar v. Rudrenda*, 57 Cal. W. N. 524 Contra; *Sunderlingam Chettiar v. S. Nagalingam Chettia*, 1958 Mad. 307). The Supreme Court held in *Vikramdas v. Daulat Ram*, (1956 A. L. J. 434) that *de facto* trustees ordinarily could not claim any rights in respect of the trust, but if they had been in *bonafide* possession for sometime they could be allowed to preserve trust property from prespassers.

(4) Directing account to be taken from defendants Nos. 1-10 of the income of the trust property and payment of the balance to the new trustees.

Cost of the plaintiff in a suit under S. 92 can be awarded out of the trust funds (*Waraes Ali v. Sheikh Samsuddin*, 63 C. L. J. 573).

A suit which falls under Sec. 92 cannot be instituted except under that section or, in the case of a religious endowment of a public nature, under Sec. 14, Religious Endowments Act, while one which does not so fall may be instituted in the ordinary way, e.g., a suit to enforce a private right. A worshipper at a temple has a right to bring a suit to restrain waste of, or encroachment upon, the trust property by the trustees. The primary right of interested persons in such cases is to sue for removal of the trustees, but they may also be allowed to waive that right and to sue under O. 1, R. 8 for the removal of encroachment made by the trustees. (*Dr. Mukandlal v. Mohan Lal*, 101 I. C. 744).

A suit for the reliefs mentioned in Section 92 without sanction cannot be cured by amendment and abandonment of such reliefs (*Gajramaji v. Som Nath*, 1940 (Bom.) 242.)

In a plaint under this section, the nature of the trust, the plaintiff's interest in it, the breach of trust or other reason for the suit and the specific reliefs claimed should be clearly alleged. Under Sec. 92, C. P. C. it is not necessary that a person should have a direct interest to enable him to institute a suit but at the same time the right of suit is restricted to those persons who have a present and substantial interest and not a remote or fictitious or illusory interest. (*Farman Ali Khan v. Md. Raza Khan*, 1949 A. L. J. 453). The suit cannot be brought by less than two persons, but on the death of one may be carried on by the other, (*Ram Gulam v. Shyam Sarup*, 50 A. 687, 1933 A. L. J. 1393; *Bapiraju v. Ramchandra*, 146 I. C. 628, 1933 M. W. N. 1286, 65 M. L. J. 690, 1931 (Mad.) 854). A relief not covered by the sanction should not be claimed, e. g., ejectment (*Brindaban v. Mt. Wanti*, 144 I. C. 168, 1933 (Lah.) 395); but if one is claimed the whole suit is not rendered bad (*Devi v. Alpati*, 106 I. C. 134, 1927 (Mad.) 1033). Such a suit should be instituted in the principal civil court of original jurisdiction (which is usually the court of District Judge) or any other court specially empowered by Government to try such suits. To an appeal from an order under Sec. 92, District Judge should not be joined as a respondent (*Sabdevachari v. District Judge, Benares*, 1933 (All.) 151, 144 I. C. 701 (1)). All persons interested in the relief claimed must be impleaded as defendants. The Court should itself implead any such person omitted, e.g., an alienee of trust property denying the trust (*Anjaneya v. Kothandapani*, 164 I. C. 615, 1936 (Mal.) 449).

Even in case of a private trust if there is breach of trust or mismanagement a suit in the civil court can be filed by any person interested for removal of the trustee and proper administration of the endowment. *Thenappa Chettiai v. Kamppan Chettiai* A.I.R. 1968 S.C. 915. This will not be a suit u/s 92 C.P.C. but an ordinary civil suit. In

(5) Directing the new trustees to apply the income of the said property to the different objects of the trust according to the directions in the deed of trust.

No. 290—Suit by beneficiaries for ejectment of a trespasser impleading trustee (dd)

1. There is in the village of Shampur a mosque called the Sunehri masjid to which certain shops and lands, which include the land specified at the foot of the plaint, are attached.

2. The said mosque, lands and shops are *wakf* property for the benefit of all Muslims and defendant No. 2 is the Mutwalli of the said *Wakf*.

3. The plaintiffs are Muslim residents of the village Shampur and congregate, along with other Muslim residents of the village, in the said mosque for offering prayers.

appropriate case the plaintiffs may avail of the procedure under O/28 C.P.C., *Limitation*: If S. 10 Limitation Act applies there is no limitation for a suit for declaration that property in possession of Mutwalli is *wakf* property. (*Md. Shah v. Fasibuddin* 1956, S.C. 713). *Sanction*. Under Sec. 93 C.P.C. the Provincial Government has to invest the collector with authority afresh in each case to exercise powers conferred on the Advocate-General under Sec. 92, C. P. C. and a general appointment to act in all cases as they arise will not do. (*Nanhoobeg v. Ghulam Husain*, I. L. R. 1950 Nag. 50).

(dd) Though ordinarily all suits for recovery of endowed property from trespassers must be instituted by the trustee or *Mutwalli*, there is nothing to prevent any beneficiary (e.g., a worshipper at a temple or mosque) from instituting any such suit when the trustee either sets up a hostile title or neglects or refuses to use. The relief may be either declaration that the property is trust property or injunction or ejectment and recovery of possession as may be required. (*Ettyat Ahmad v. Vayalkuth*, 173 I. C. 586, 1937 Mad. 819). When there is a trustee it would be proper to implead him as a defendant, but the deity is not a necessary party (*Monindra Mohan v. Shamnagar Jute Factory*, 43 C. W. N. 1056, 1939 (Cal.) 699, 186 I. C. 25). In case of a suit for recovery of trust property from a trespasser it is not necessary that actual possession should be given to the plaintiff. The court can, after making a declaration, direct that possession be delivered to the trustee as such and when there is no trustee the court can direct possession to be delivered to the plaintiff on behalf of the trust *Rangaswami v. Krishnaswami*, 71 I. C. 463, 1923 (Mad.) 276 and 1923 M. W. N. 84). Such a suit need not be a representative suit but may be instituted by any beneficiary without even impleading any other beneficiary (*Fabimul Haq v. Jagat*, 74 I. C. 403, 1923 (Pat.) 475). When a suit was brought as a representa-

4. Defendant No. 1 has, on or about the 3rd February 1939, unlawfully taken possession of the land specified at the foot of the plaint and has built a wooden structure thereon and opened a tea-shop.

5. The plaintiff served a notice on defendant No. 2 requiring him to eject defendant No. 1 and recover possession of the said land, and defendant No. 2 has replied that the land is not *Wakf* property but belongs to him and that he has let it out to defendant No. 1.

The plaintiff therefore claims—

(a) a declaration that the land specified at the foot of the plaint is *Wakf* property and not the private property of defendant No. 2;

(b) ejectment of defendant No. 1 from the said land.

No.—291—Suit under Section 14 Religious Endowments Act (ee)

1. The temple known as the temple of Sri Girdhar Gopal Ji in the town of Mathura was built about in the year 1850 by one Seth Kishorilal of Agra, who dedicated considerable movable property and jewellery to the deity and

tive suit, limitation was held to be governed by Art. 134 A and was held to run from the date of plaintiffs knowledge, and not from the knowledge of all others whom the plaintiffs represent (*Sir Veerabhadraswami v. Maya Kone*, 1939 M. W. N. 1137, 1940 (Mad.) 81). Now Art. 94 of Act of 1963 will apply.

The Privy Council has held that such suits by a person other than *Mutwalli* are allowed only in special circumstances and in such cases the right of the *wakf* is asserted on behalf of all interests in the *wakf* whether present or future, absolute or contingent (*Saadat Kamel v. Attorney General, Palestine*, 1939 (P. C.); 185 (P. C.) I. C. 101). The Allahabad High Court has held that a suit for possession of property illegally transferred by a person previously in legal possession cannot be maintained by a mere worshipper if he has no other title or right to claim possession (*Jagtanand v. Barhmdeo*, 1940 (All.) 68).

(ee) In respect of public religious establishments such as mosques and temples, Sec. 14 provides an alternative remedy to that provided by Sec. 92, C. P. C. Such a suit can be brought against the trustee, manager or superintendent of a religious establishment or against the members of any committee appointed under the Religious Endowments Act

endowed considerable immovable property for the expenses and upkeep of the said temple, and by a deed of endowment, dated August 15, 1851, directed, among other things, that out of the income of the endowed property, Rs. 200 a month should be spent on the upkeep of a *pathshala* or a small school for religious teaching which had been opened by him in part of the said temple, and Rs. 1,200 be spent on *rajbhog* of offering of food to the detiy.

2. By the said deed of endowment, the said Seth Kishorilal appointed his son Raja Ram as sole trustee of the said temple and property and directed that after the said Raja Ram's death, his eldest son should be the trustee.

3. The defendant being the eldest son of the said Raja Ram has been the trustee and manager of the temple and the endowed property since 1920.

4. The defendant has been guilty of the following acts of misfeasance and breach of trust :—

- (a) He has disposed of or converted to his own use the articles of jewellery mentioned in Schedule A attached to the plaint which should be treated as part hereof, which had been dedicated by Seth Kishorilal for the use of the idol.

in respect of the trust vested or confided to them respectively. There is no reason to restrict the applicability of Sections 14 and 18 of Religious Endowments Act of 1863 only to endowments which were in existence on that date. (*Bhagwan Das v. Moti Chand*, 1949 All. 612). Even one person can sue and no permission of Advocate-General is necessary. The plaintiff should show in the plaint (1) that he is interested in the religious establishment or in the performance of the worship or service thereof or in the trust relating thereto; (2) that the defendant has committed any misfeasance, breach of trust or neglect of duty in respect of the trust vested in or confided to him; (3) the relief claimed, which may be specific performance of any act by the defendant, damages, or removal of the defendant from the office of trustees or manager or superintendent, but not appointment of a new trustee (*Sada Shankar v. Hari Shankar*, 5 A.L.J. 191; or rendition of accounts of the trust property (*Ram Narain v. Jai Narain*, 1961 All. 125; A.I.R. 1966 All. 189). For any other relief, a suit under Sec. 92 will be necessary. The trustee, manager or superintendent who can be sued, should according to the Allahabad H. C., be one appointed under the Act (*Sher Khan v. Bhura Shah*, 1935(All.) 273); but the Calcutta H. C. has in one case held that only

(b) During the time of Seth Kishorilal and Raja Ram's trusteeship two teachers were employed for the *Pathshala* at Rs. 50 and Rs. 30 p.m. respectively, and 16 scholarships of Rs. 5 were given to the students. The defendant has, within a year of his taking over charge, dismissed the senior teacher and since then only one teacher on Rs. 30 p.m. has been employed and only 6 scholarships have been given, with the result that the *pathshala* has become unpopular and attendance has fallen to less than half.

(c) The temple building was not properly repaired with the result that the roof of the big front hall used as a waiting hall for the visitors fell down 4 years ago and the hall was totally ruined 3 years ago.

5. The plaintiff is a Hindu resident of Mathura and is interested in the temple as a daily worshipper at it.

The plaintiff claims—

(1) That the defendant be removed from the office of the trustee;

Or

(a) that the defendant be directed to appoint a senior teacher for the *pathshala* on a pay of at least Rs. 50 p. m. and to allow at least 16 scholarships to the students; and

hereditary trustees under Sec. 4 can be sued under Sec. 14 (*Bhima v. Dasbrathi*, 40 Cal. 323), while in other cases it has been held that Sec. 14 applies to trustees, whether hereditary or selected (*Mobaomed Athar v. Ramjan Khan*, 34 Cal. 587; *Badar Rahim v. Badhsab Mia*, (62 Cal. (125)). The Madras H. C. takes the latter view (*Mathur v. Ganathora*, 17 Mad. 95).

For the interests which a plaintiff may have so as to be entitled to sue, see Sec. 15. The suit can be filed in the principal court of original civil jurisdiction in the district. A preliminary application for leave to institute the suit should be made to the court before institution of the suit (Sec. 18). As in the application the plaintiff has to show sufficient *prima facie* grounds for the suit, all the allegations which are to be made

- (b) that the defendant be directed to rebuild out of the trust funds the big front hall of the temple just as it was before its roof fell down.
 - (2) A decree of Rs. 5,673, being the value of the said jewellery, misappropriated or disposed of by the defendant, as damages for the defendant's said act of conversion, against the defendant personally.
 - (3) Costs of this suit against the defendant personally.
-

in the suit should be made in the application. It may be more convenient to attach a copy of the proposed plaint to the application, in which case it will not be necessary to detail all the facts over again in the application. The application requires to be verified (*Amdoo v. Muhammad Davud*, 24 M. 685) but it is not necessary that notice of it should be given to the other side (*ibid.*) or an inquiry be held before leave is granted (*Syed Husain v. Syed Hamid*, 1930 A. L. J. 1208).

What amounts to a Public Trust. The S. C. laid down certain tests in the case of *Goswami Shri Mahalaxmi Vehuji v. Shah Ranchhadas* A. I. R. 1970 S. C. 2025 (2030-31).

DEFENCE

It has been fully explained in Chap. XIV of the first part how a written statement should be drafted by the defendant. There are some pleas which are of general character and can be raised in all cases, *e.g.*, pleas of denial, limitation, jurisdiction, etc. What other particular and special pleas can be raised in particular suits has been indicated in the foot-notes to the precedents of complaints in such suits. It should not, therefore, be a difficult task for a defendant to frame his pleas in the written statement. It has not, therefore, been considered necessary to give precedents of written statement in all the suits for which forms of complaints have been given. But model written statements have been drawn up for more important suits and these written statements have been drafted with reference to the precedents of complaints given in this book. The number of the complaint to which a particular written statement relates has been given at the top of the written statement, and it would be profitable to read the complaint and the written statement together.

Before these model written statements will be found forms of certain pleas of general character which can be taken in all kinds of suits. They will show how such pleas which are common to many suits should be drafted.

GENERAL DEFENCES

No. 1—Accord and satisfaction (a)

(By work done)

From January 20, 1925 to January 29, 1925 the defendant did certain work for the plaintiff in repairing his furniture and making certain new furniture, which work was done

(a) The plea of mere accord is no defence and should not be raised without the plea of satisfaction.

by the defendant and accepted by the plaintiff in satisfaction and discharge of the plaintiff's claim under the said bond in suit.

(By giving a bond)

1. The defendant, on May 4, 1925, executed a bond in favour of the plaintiff in lieu of the price of grain due from the defendant to the plaintiff for which the plaintiff has brought this suit.

2. The said bond was executed and delivered by the defendant and received and accepted by the plaintiff in discharge of the plaintiff's claim for the said price of grain.

(By delivery of cattle)

1. On November 15, 1924, it was agreed between the parties that the defendant should deliver to the plaintiff, and the plaintiff should accept, 2 cows and 2 bullocks belonging to the defendant, in full satisfaction and discharge of the plaintiff's claim under the bond in suit.

2. On November 16, 1924, the defendant in pursuance of the said agreement, delivered to the plaintiff, and the plaintiff accepted, the said cows and bullocks in full discharge of the said bond.

Or

1. On November 15, 1923, it was agreed between the plaintiff and the defendant that the defendant should deliver to the plaintiff and the plaintiff should accept, the defendant's horse, in full satisfaction and discharge of the plaintiff's claim for damages for the horse shot by the defendant.

2. On November 20, 1923, the defendant, in pursuance of the said agreement, delivered to the plaintiff, and the plaintiff accepted, the said horse in full discharge of his said claim.

No. 2—Acquiescence

See ante for ingredients of this plea.

No. 3—Condition precedent (b)

(Condition in the agreement)

1. By the agreement of October 20, 1924 referred to in the plaint, it was a condition precedent to the liability of the defendant for payment of the work done by the plaintiff that the plaintiff should get the said work checked by the District Engineer, Saharanpur, and certified by him as having been properly done.

2. The plaintiff did not get the said work checked or certified as aforesaid.

(Condition of statutory notice)

1. Under Sec. 54 of the Cess Act (Bengal Act IX of 1880) a notice by the plaintiff to the defendant is a condition precedent to the liability on the part of the defendant to pay cess.

2. The said condition was not performed in that no such notice was given by plaintiff to the defendant before the suit.

(The like, in a brief form)

The plaintiff did not prefer his claim in writing to the defendant Railway Company in the manner, and during the period, prescribed by Sec. 78-B of the Indian Railways Act, and the suit is not, therefore, maintainable.

(See more forms under notice)

(b) *Vide* O. 6, R. 6, C. P. C. The defendant must specifically plead any condition precedent, the performance or occurrence of which he intends to contest. If the defendant does not plead it, the objection will be considered to have been waived. The plaintiff is not bound to plead the performance or occurrence of it in his plaint, therefore the defendant cannot take an objection in point of law on the basis of the plaintiff's omission to plead the same. If the condition is statutory, e.g., of a previous notice required by law as in the case of a suit against railway administrations, the condition need not be stated at length, but a reference to the law may be made and it may be alleged that the condition required by it has not been performed.

No. 4—Custom or Usage (c)

(Communal custom)

Amongst the Jats of the Meerut division there is a certain and reasonable custom which is immemorial and has been followed without interruption, that a Jat widow can contract a valid marriage with a man of any caste.

(Local custom)

There is a certain reasonable and immemorial custom in village Danderi which has been followed without interruption that all ryots can transfer, by sale or mortgage, the right of residence which they have in their houses in the *abadi* of the said village.

There is in Mohalla Abupura in the town of Muzaffarnagar a local custom of pre-emption particulars of which are given below and the said custom is certain, reasonable immemorial and has been followed without interruption.

(Particulars)

The custom is about pre-emption of houses and its incidence are the same as of the law of pre-emption under the Muhammadan Law with this exception that under the custom *talabs* or demands are not necessary in any particular from but simply one demand is necessary to be made in any form.

(Usage of trade)

There is a custom in the Shamli grain market, that on all *Khatti* transactions interest is charged at 7/8 per cent per

(c) Custom should be alleged specifically with all material details. It is not sufficient to plead that the defendant is entitled to such and such thing under village custom or that the plaintiff has no right to the property under the local custom of the village. The custom should be alleged in a separate paragraph, with such terms as are material to the defence. If the custom is so well established as to have become a well-known law, e.g., the custom amongst the Jains permitting adoption by widows without express authority from their husbands, it need not be alleged with full particulars. As the essential requisites of a valid and binding custom are that it should be certain, reasonable and immemorial and should have been followed without interruption, those

annum on all moneys due to the principal from a commission, agent or *vice versa*, and this custom which is certain, reasonable and immemorial, has been followed without interruption.

No. 5—Denial (d)

(Forms given in App. A, C. P. C)

The defendant denies that *(set out facts)*.

The defendant does not admit that *(set out facts)*.

The defendant admits that but says that.

(Denial of execution)

The defendant denies that he borrowed Rs. 200 or any other sum from the plaintiff, or that he executed the bond in suit.

(Denial of custom)

The defendant denies that there is any custom amongst the Jats of the Meerut division under which daughters do not take a share in the inheritance of their fathers.

(Denial of consideration)

The defendant admits that he executed the bond in suit, but denies that he received the consideration alleged in para. 1 of the plaint, or any consideration, for the said bond.

(Denial of tenancy)

The defendant denies that he entered into possession of the house in suit under the lease alleged in para. 1 of the plaint or under any other lease.

(Denial of lengthy allegations of facts)

The defendant denies that he spoke or published the words alleged in para. 1 of the plaint.

qualities should also be alleged. If the particulars and details of the custom are small, these requisites may be alleged along with them, but if they are considerable they may be alleged with the allegation of custom and particulars should be given separately below.

(d) The words of the plaint should be used when denying a fact. But where the statement of facts in the plaint is very lengthy there is

(Ditto)

1. The defendant denies that he made any of the several representations alleged in paras. 2, 3, and 4 of the plaint.

2. The defendant denies that the plaintiff was induced to execute the said sale-deed by any of the said alleged representations.

(Denial of due execution and attestation)

Defendant denies that the alleged deed of gift was duly executed or attested.

(Particulars)

The signature of the executant were obtained on blank paper on which the deed was engrossed subsequently. The attesting witnesses neither saw the executant sign the deed nor did they attest it on the executant's acknowledgment.

No. 6—Estoppel (e)

(Form given in App. A, C. P. C.)

The plaintiff is estopped from denying the truth of *(insert statement as to which estoppel is claimed)* because *(here) state the facts relied on as creating the estoppel*.

(Estoppel by document)

The plaintiff is estopped from saying that he was not the owner of the property in suit on December 20, 1920, because the plaintiff represented by his recitals in the sale-deed executed on the aforesaid date in favour of the defendant that he was the owner of the said property, and thereby induced the defendant to purchase it from the plaintiff.

(Estoppel by representation)

The plaintiff is estopped from denying that the defendant's vendor Musammat Ram Piari had an absolute interest in the property, by reason of the fact that the plaintiff had him-

no objection to the defendant alluding to the facts by their substance and denying them, but the facts denied must be clearly and unmistakably referred to in the plea.

(e) Full facts constituting the estoppel must be given.

self represented to him on December 20, 1917, that the said Musammat Ram Piari had an absolute interest in the property, and had thereby induced the defendant to purchase it from the said Musammat Ram Piari.

(Estoppel by conduct)

The plaintiff is estopped from asserting that the property belongs to him because the said property was, in the knowledge of the plaintiff, put up to auction sale in execution of decree No. 900 of 1920 passed by the Munsif of Rangpur against one Karim Baksh, and the plaintiff, and the defendant both attended the said auction sale on June 10, 1922, and bid for the property, and the defendant purchased the property, as the highest bidder, and the plaintiff never made any claim to the said property but by his said conduct induced the defendant to believe that the plaintiff had no claim to the said property.

(Estoppel by omission)

The plaintiff is estopped from asserting the mortgage in suit by the reason of the fact that he had put to sale the property in suit in execution of his money decree No. 200 of 1920, passed by the Subordinate Judge of Delhi, without giving the purchasers a notice of the mortgage now sought to be enforced and thus induced the defendant to believe that the property was being sold free from plaintiff's encumbrance, if any, and to purchase the property under the said belief.

No. 7—Fraud (t)

The defendant was induced to make the alleged contract by fraud of the plaintiff.

Particulars of the fraud : In order to induce the defendant to agree to purchase the property, the plaintiff, on June

(f) Fraud may be pleaded as an answer to the enforcement of any contract. But full particulars of the fraud alleged must be given.

No case of fraud can be gone into by courts unless it is pleaded with the utmost particularity and unless it is found as laid. (*Mate Nande v. Dalchand*, 1948 (Nag.) 170).

10, 1921, verbally represented to the defendant, falsely and fraudulently, that the net annual profits of the property were Rs. 400, whereas, as the plaintiff well knew, the fact was that the net profits of the said property were only Rs. 250.

No. 8—Illegality (g)

The alleged agreement was without consideration and is therefore void.

The alleged contract was against public policy.

The consideration of the alleged contract was immoral.

The alleged mortgage being a transfer of an occupancy holding is void.

No. 9—Insolvency (h)

(Form given in App. A, C. P. C.)

The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.

(plaintiff's insolvency)

The plaintiff has been adjudged insolvent by order of the District Judge of Bhagalpur, dated May 15, 1924, and the cause of action sued on herein vested in the receiver of his property.

(Defendant's insolvency)

1. The defendant has been adjudged insolvent by order of the District Judge of Trichnopoly, dated November 16, 1925.

2. The debt in suit is one which was provable under the Provincial Insolvency Act.

(g) Facts showing the illegality of the contract must be given. It is not sufficient to allege that the contract was illegal or void. A plea of mere denial of the contract would not include a plea of its illegality.

(b) The result of adjudication of insolvency is described in Sec. 28 of Act V of 1920. All property of the insolvent vests in the receiver and the latter, and not the former, should therefore bring any suit concerning the same. No creditor of the insolvent can sue the insolvent in respect of any debt provable under the Act, except with the leave of the court obtained before the suit (*Dwarka v. Tej Bhan*, 40 B. 235).

3. The plaintiff has not obtained the leave of the court as required by Sec. 28, Act V of 1920, and cannot therefore bring this suit.

No. 10—Jurisdiction (i)

(Form given in App. A, C. P. C.)

The court has no jurisdiction to hear the suit on the ground *(set forth the grounds)*.

(Territorial)

Defendant denies that he resides within the jurisdiction of this court. He resides at Karnal, and this court has no jurisdiction

Or

The defendant denies that the bond was executed at Meerut. It was executed at Delhi, and this court has therefore no jurisdiction to try the case.

Or

The defendant denies that money payable under the said contract was made payable at Meerut, and submits that this court has no jurisdiction to try the case.

(Pecuniary)

The defendant denies that the value of the subject-matter of the suit is Rs. 2,000. It is Rs. 900, and the suit is not cognizable by this court.

(Regular and Small Cause Courts)

The suit is cognizable by the Small Cause Court and this court has no jurisdiction to try it.

Or

The alleged act of the defendant amounts to a criminal offence, hence the cognizance of this suit by the Small Cause

The prohibition does not extend to debts not provable under the Act. For what debts are provable, *See* Sec. 34. But proceedings commenced before adjudication can be continued without leave of the court against the insolvent. Mere filing of a petition of insolvency does not debar any remedy against the insolvent. The bar continues upto the date of discharge.

(i) *Vide ante.*

Court is barred by Art. 35 (ii) of the first Schedule to the Provincial Small Cause Act.

(Note. In the U. P. Art. 35 (ii) has been repealed by U. P. Act 2 of 1954).

(Civil and Revenue)

The suit is one cognizable by a Revenue Court under Sec.—of Act—of—, and its cognizance by a Civil Court is barred by Sec.—of that Act.

No. 11—Limitation (j)

The plaintiff has not been in possession at any time within 12 years before this suit, and the suit is barred by Art. 142 of the second Schedule to the Limitation Act, 1908.

The defendant obtained physical possession of the house purchased by him on June 13, 1924 hence his suit, filed on June 15, 1952, is barred by Art. 10 of the second Schedule to the Limitation Act, 1908.

The defendant does not admit that the plaintiff attained majority on June 10, 1920, and submits that he attained majority in 1918 and the suit is therefore barred by Sec. 8 of the Limitation Act, 1908.

The defendant denies that he made the payment alleged in para. 4 of the plaint.

The defendant admits that he paid Rs. 500 as alleged in para. 4 of the plaint, but denies that he did so on account of the debt in suit.

(j) When the plaintiff claims that the suit falls within any exception to the general rule, it is enough to deny the facts bringing the suit within that exception, and it is not necessary expressly to plead that the suit is barred by limitation.

The defendant admits having made the payment alleged in para. 4 of the plaint, but denies having put his thumb-mark under the endorsement of payment.

The defendant did not make the acknowledgment alleged in para. 4 of the plaint.

The defendant admits having made the statement alleged in para. 4 of the plaint, but contends that it does not amount to an acknowledgment which could, under the law, extend the period of limitation.

(Form given in App. A, C. P. C.)

The suit is barred by article or article of the second Schedule to the Indian Limitation Act, 1963.

No. 12—Minority (k)

The defendant was born on , and was, on the date of the alleged agreement, a minor.

The plaintiff is and on the date of the institution of this suit was, below the age of 18 and therefore a minor, and he cannot bring this suit without a next friend.

1. The defendant was born on

(k) Minority may be pleaded as a complete defence to a suit on the basis of an agreement, as all contracts made by a minor are void. The minor is not estopped from pleading his minority as a defence by his having himself represented to the plaintiff at the time of contract that he was major (*Radha Kishen v. Bhorey*, 26 A. L. J. 83, 110 Il C. 837, 1928 (All.) 83; *Gulabchand v. Chunnilal*, 1929 (Nag.) 156, 25 N. L. R. 85; *Khangul v. Dakha*, 111 I. C. 175, 1928 Lah. 609; *Gadegappa v. Balan-gowda*, 55 B. 741, 1931 (Bom.) 561, 33 (Bom.) L. R. 1313. See note under "Suits for cancellation". The minority must be alleged specifically on the date of the alleged agreement. The present minority of the plaintiff may be pleaded as bar to the institution of the suit without a next friend. If the defendant is a minor and is sued as major, he must

2. By an order, dated , the District Judge of Poona appointed one Ram Prasad as guardian of the person of the defendant.

3. The defendant therefore was, on the date of the alleged execution of the bond in suit, a minor.

The defendant was born on , and is a minor and cannot be sued without a guardian *ad litem*.

(Form given in App. A, C. P. C.)

The defendant was a minor at the time of making the alleged contract.

No. 13—Misjoinder

The suit is bad for misjoinder of causes of action.

The suit is bad for misjoinder of defendants and causes of action.

The suit is bad for misjoinder of plaintiffs and causes of action.

No. 14—Mistake (I)

The agreement to sell the horse as alleged in para. 1 of

make an application through some guardian pleading that he is a minor, and the court will then have a preliminary hearing on that question and determine whether he is minor or major. But the minority of a co-defendant is no defence and should not therefore be pleaded. For example, if there are two defendants A and B to a suit for possession, and B is a minor and is absent, A cannot plead that the suit is barred as B is sued as a major. That is no concern of A and the defect in the suit does not exonerate him from his liability. If B wants to plead it, he can.

But while minority is a defence to a suit on a contract, it is no defence to a suit based on tort, *e.g.*, to a suit for assault, false imprisonment, trespass, libel, etc. But when intention, knowledge, malice or some other condition of the mind forms an essential ingredient of the wrong (as in the case of fraud), extreme youth by which the defendant was incapable of contriving the fraud, etc., will afford a defence. An action which arises from a contract cannot be changed into one for tort in order to make the minor defendant liable, *e.g.*, in a suit on a bond given by a minor, the plaintiff, cannot succeed by alleging that the defendant had made fraudulent representation about his age (*Dhanmull v. Ramchander*, 24 C. 265).

(I) A mistake in order to render an agreement void must be a mutual mistake of both the parties and it must be about a matter of

the plaintiff was entered into under a mutual mistake about a fact essential to the agreement.

Particulars of the mistake : The horse which the defendant agreed to sell and the plaintiff agreed to buy, had, before the date of the said agreement, been dead, and neither the plaintiff nor the defendant was aware of this fact at the time of making the agreement.

No. 15—Nonjoinder

_____being a subsequent mortgagee (or, a son of the mortgagor and having an interest in the mortgaged property) is a necessary party.

_____is also a joint co-sharer in the land in dispute and the plaintiffs cannot sue alone.

The suit is bad for nonjoinder of _____who is a necessary party.

No. 16—Notice (m)

(Defence by a public officer)

The plaintiff did not deliver to the defendant any notice as required by Sec. 80, C.P.C. before the institution of this suit, and the suit is therefore not maintainable.

*(Defence by Central Government representing Railway)**

The defendant does not admit the allegation in para. 6 of the plaint that a notice was delivered as required by Sec. 80, C. P. C. The notice as alleged in para. 6 was sent

fact essential to the agreement (Sec. 20, Contract Act). These facts should be alleged. If the mistake is not mutual, but the defendant alone was under a mistake he cannot avoid the contract, unless he can show that the mistake was caused by the plaintiff, in which case it would become a misrepresentation. Nor will a mistake about law be any defence unless there was a mistake of fact about which it was made.

(m) There are some suits which cannot be instituted without a previous notice. The notice may be one provided by the agreement between the parties or by law. It is a "condition precedent" and is not pleaded by the plaintiff, but defendant must plead its absence if he wants to contest the suit on the ground of want of notice.

to the Agent of the Northern Railway and not to the General Manager thereof.

The plaint contains no statement of any notice having been delivered to one of the officers mentioned in Sec. 80, C. P. C. and is therefore bad.

(*See also under "condition precedent"*)

No. 17—Insufficiency of Notice

The notice under section 80, C. P. C. upon the Collector was not sufficient in law inasmuch as it did not specify the relief which the plaintiff has claimed, (or, in as much as the cause of action stated therein was an alleged negligence, while the present suit has been brought on the ground of an alleged nuisance).

No. 18—Payment

See page ante for precedent of plea for payment.

No. 19—Payment into court (n)

1. The defendant deposits in court the sum of Rs. 500 and says that the said sum is sufficient to satisfy the plaintiff's claim.

2. The plaintiff never demanded the same from the defendant before instituting the suit.

Or

1. The defendant does not admit that any interest was agreed upon as alleged in para. 1 of the plaint.

But when law which requires it also lays down that the fact of the giving of the notice should be mentioned in the plaint, the plaintiff must allege it. If he does not allege it, the defendant may take a legal objection that the plaint is bad. If he alleges it, and the defendant pleads non-service of the notice he may simply deny the plaintiff's allegation, and that will be a sufficient defence. It will not be necessary to plead that the suit is bad. A plea that the suit is barred by Sec. 80, C. P. C. is not in proper form.

(n) *See* O. 24, C. P. C. It is always better for a defendant who has no other defence, to pay the amount he considers due to the plaintiff, as that will save him from further interest and costs. He may also plead that the plaintiff had not demanded the money from him before bringing the suit, and if he proves this or any other facts showing that

2. The principal amount is due. The defendant deposits the same in court and says that it is sufficient to satisfy the plaintiff's claim.

3. The defendant was always ready and willing to pay the principal amount.

(Form given in App. A, C. P. C.)

The defendant as to the whole claim (or as to Rs. part of the money claimed, or *as the case may be*) has paid into Court Rs. _____ and says that this sum is enough to satisfy the plaintiff's claim (or the part aforesaid).

No. 20—Performance remitted (*)

(Form given in App. A, C. P. C.)†

The performance of the promise alleged was remitted on the (date).

(Ditto, another form)

The plaintiff by a letter written and signed on the _____ and posted to the defendant which the defendant received on the _____ excused the defendant from the obligation to perform the alleged promise.

No. 21—Penalty

The clause in the deed of contract (or, bond) on which the plaintiff bases his claim is a penalty and the defendant submits that in the event of a breach being established, the

the plaintiff was to blame for the litigation, he will get his costs and the plaintiff will not be allowed any costs. But a plea that the plaintiff had not demanded the money from the defendant, without payment of the amount in court, would be no defence to a suit, nor would it deprive the plaintiff of his costs, unless demand was a part of the cause of action, e.g., in a suit by a customer against a banker.

*This is allowed by Sec. 63, Contract Act and therefore unlike the English Law does not require any consideration (*Mulchand v. Tarachand*, 116 I. C. 646, 1929 Nag. 137; *Govind Singh v. Bijoy*, 1929 All. 980; *Contra*, 111 I. C.).

†This form is devoid of particulars and is defective.

plaintiff should be allowed only a reasonable compensation which will be very much less than the penal sum provided in the said clause.

No. 22—Protest

(App. A., C. P. C.)

The defendant denies that he is a partner in the defendant firm of . The defendant denies that he made the contract alleged or any contract with the plaintiff.

No. 23—Rescission

The contract alleged in the plaint was rescinded (or, the defendant was exonerated and discharged by the plaintiff from performing the alleged contract) before breach, by an arrangement between the plaintiff and the defendant made verbally on November 14, 1922.

(Ditto)

The contract alleged in the plaint was rescinded by the parties before breach, by being superseded by another contract made between the plaintiff and the defendant in writing on November 14, 1922.

(Form given in App. A, C. P. C.)

The contract was rescinded by agreement between the plaintiff and defendant.

No. 24—Registration, invalidity of

The mortgage deed has not been duly registered as the property comprised therein wholly lies within the circle of the Sub-Registrar of———while the purported registration was made in the sub-registry office at———

No. 25—Res Judicata

Vide ante for precedents of this plea.

(Form given in App. A, C. P. C.)

The plaintiff's claim is barred by the decree in suit (give the reference).

No. 26—Set off (o)

1. As to Rs. 504, part of the money claimed by the plaintiff, the defendant claims to set off the same, against the sum of Rs. 300, principal and Rs. 204 interest due to the defendant at the agreed rate of interest of 12 per cent per annum, on account of the price of cloth purchased by the plaintiff from the defendant on November 14, 1924.

2. As to the rest of the plaintiff's claims, the defendant confesses judgment.

1. The plaintiff purchased from the defendant on January 14, 1922, two bullocks for Rs. 350, and paid Re. 1 as earnest money, and the remaining Rs. 349 is still due to the defendant from the plaintiff.

2. And the defendant claims to set-off the said sum of Rs. 349 against the plaintiff's claim in this suit.

1. The defendant admits that the plaintiff had agreed to sell, and the defendant had agreed to purchase, 2,000 maunds of cotton on the date mentioned in para. 1 of the plaint.

2. The defendant admits that the plaintiff supplied 1,500 maunds to the defendant and the defendant has not yet paid the price thereof.

3. The defendant claims set-off of Rs. 5,000 due to him from the plaintiff on account of damages for the plaintiff's breach of contract to supply the remaining 500 maunds of cotton.

Particulars : Difference between the contract price and the market rate on January 15, 1924, at Rs. 10 per maund on 500 maunds—Rs. 5,000.

1. The plaintiff owes to the defendant the sum of Rs. 2,000 on account of the price of goods sold and supplied by the defendant to the plaintiff and cost as per particulars given below :—

(o) A written statement pleading set-off must be framed in an appropriate manner having regard to the provisions of Order 8, Rule 6, C. P. C. and must bear the necessary court fee.

		Rs.
<i>Baisakh Sudi 5th, 1978</i>	To 100 maunds of wheat	
	@Rs. 5 per maund ..	500
<i>Jeth Sudi 5th, 1978</i>	To 50 maunds of grain	
	@Rs. 4 per maund ..	200
<i>Magh Sudi 5th, 1978</i>	To 60 maunds of Sugar	
	@Rs. 20 per maund	1,200
Cost of transit of wheat	.. ..	70
Cost of transit of sugar	.. ..	30
	Total ..	2,000

2. The defendant claims a set-off of the said sum against the plaintiff's claim and prays for judgment for the amount of his claim which may be found to be in excess of the plaintiff's claim.

No. 27—Stay of suit (Sec. 10, C. P. C.).

No. 28—Subsequent to institution of suit,
ground of defence (p)

(*App. A, C. P. C.*)

Since the institution of the suit, that is to say, on the day of
(*set out facts*).

No. 29—Tender (q)

The defendant, on September 14, 1924 tendered Rs. 500 to the plaintiff on account of the bond in suit, but the

(p) For the purpose of shortening litigation and doing complete justice to the parties the court is not precluded from taking into consideration facts which happened after the suit was filed. (*Kamla Rani Roy v. Baijnath Bajoria*, 53 C. W. N. 329).

(q) Tender of the money claimed before the suit is a good defence against the claim for costs and interest. It must have been unconditional and of the full amount due to the plaintiff. If the tender was short it is no defence, unless the shortage was due to a *bona fide* mistake (*Abdul Rahman v. Nur Muhammad*, 16 B. 141). Cash should be produced, and it is not sufficient to say that the defendant is ready to pay if the plaintiff will accept the money. Tender should be alleged in details as to when and how much was tendered. In order to make the plea fully effectual, it should be accompanied by a deposit of the money in cash (*Abdul Rahman v. Nur Muhammad*, 16 B. 141), but it is sub-

plaintiff refused to accept the same (and the defendant now deposits the same in court).

No. 30—Undue influence (r)

The defendant admits that she executed the deed-of-gift alleged in para. 1 of the plaint, but pleads that she was induced to do so by undue influence of the plaintiff.

Particulars of the undue influence

- (i) The defendant is an illiterate *pardanshin* lady and the plaintiff is her family priest.
- (ii) The plaintiff told the defendant that the defendant would be gaining an immense religious merit if she made the gift and that if she did not, the plaintiff would not pray for her soul.
- (iii) The defendant had no adequate advice in matter and she succumbed to the influence of the plaintiff.

1. The defendant is an old man of 70 years and has been in a bad state of health and constantly ill for the last 4 years.

2. The plaintiff has, for the said last 4 years, been the medical attendant of the defendant.

3. The defendant executed the agreement to pay Rs. 5,000 as fees to the plaintiff under the aforesaid undue influence of the plaintiff.

The defendant admits the execution of the bond, but says that when he executed the bond the plaintiff was in a position to dominate, and did dominate, the will of the defendant and thereby induced him to agree to pay interest at 4 per cent per mensem.

mitted that if the defendant can show that he has otherwise spent the money which he had tendered and is not at present in a position to pay the money at once, the plea of tender should still affect the plaintiff's right to costs of the suit.

(r) The relation between the parties should be shown to have been such that the plaintiff was in a position to dominate the defendant's will. It should then be shown that the plaintiff used that position to obtain an unfair advantage over the defendant (*Vide* Sec. 16, Contract Act.).

Particulars

- (i) The defendant was a foolish youth of dissipated habits and constantly stood in need of money for immoral purposes.
- (ii) The defendant's father did not supply him with any money.
- (iii) The plaintiff began to lend money to the defendant six years ago, and since then the defendant borrowed money from the plaintiff from time to time on the terms dictated by the plaintiff.

No. 31—Unsoundness of mind

The defendant was, on the date of the alleged contract, a man of unsound mind and incapable of understanding the contract and of forming a rational judgment as to its effect upon his interests.

The defendant is a man of unsound mind and incapable of protecting his interest in the case.

The plaintiff is a man of unsound mind and incapable of protecting his interest in the case. He cannot, therefore, sue without a next friend.

Urgent need of money on the part of borrower will not itself place him and the creditor in such a position that the latter would be in a position to dominate the former's will (*Sunder Kumar v. Sham Kishan*, 5 A. L. J. 199 (P. C.)). This defence is very good in the case of *pardanashin* ladies as it is for a plaintiff to prove that he had explained the effect of the transaction to her and she had agreed to it after fully understanding it. Where undue influence is alleged the questions for consideration are :—(1) Was the transaction a righteous transaction i.e. was it a transaction which a right minded person might be expected to do?

(2) Was it an improvident act i.e., does it show so much improvidence as suggest the idea that the lady was not a mistress of herself and not in a state of mind to weigh what she was doing? (3) Was it a matter requiring legal advice? (4) Did the intention of making the gift originate with the donor? (*Karanamaya Debi v. Mayamoya Debi*, (1947) 82 C. L. J. 26).

No. 32—Wager (s)

The alleged agreement of sale of grain pits was made only as a wager on the price of grain of *Jeth Sudi* 15th, 1981 S. and no actual delivery of grain was intended by the parties at the time they entered into the said agreement.

(s) See *Bhagwan Sarup v. Burjorji*, 16 A. L. J. 241 (W.F.) for the essentials of a wagering contract. It is not sufficient that the party agreeing to deliver goods never intended to deliver them, even if the other party knew of that intention. To constitute a contract by way of wager, a *common intention* to wager is essential (*Gherulal Parakash v. Mahadevadas*, 1959 S. C. 781) and should be pleaded. It will not be sufficient to plead the intention of one party only. The fact that a contract is highly speculative will not make it wagering; but there must be proof that it was entered into upon the term that performance should not be demanded but that difference only should become payable (*Sukhdevadas v. Govindass*, 26 A. L. J. 484 (P. C.)). A subsequent agreement to the effect that buyer has no longer right to demand delivery does not make the contract a wagering one (*Rangasa v. Hukumchand*, 120 I. C. 406, 1930 (Nag.) 111). A plea of wager must be specifically raised otherwise the court cannot give relief on that ground (*Mukat v. Gulab*, 1931 A.L.J. 363, 1931 (All.) 229, 132 I. C. 422). Though a wagering contract cannot be enforced, money deposited as margin or security can be recovered (*S. P. Bhoominathan v. K. S. N. Chari*, 1944 (Mad.) 321, 216 I.C. 183).

What has to be proved in order to establish that the transaction was a wagering one is the fact that it was agreed between the parties that no delivery was ever intended to be given. The mere fact that delivery was, in fact, not given does not prove that it was not agreed to be given because there was a term in the original contract to that effect. In every case terms of the contract have to be final. (*Sheo Narian v. Bhallor*, 1950 A. L. J. 172).

For incidents attaching to transactions entered into by a Kutcha Arhatia and a Pucca Arhatia refer to *Sobhey Mol Gyanmal v. Mukund Chand Batia*, I. L. R. 51 Bom. 1 and *Bhagwan Das Nirottam Das v. Kanji Deoji*, I. L. R. 30 Bom. 205.

FORMS OF WRITTEN STATEMENTS

Defence in suits on contracts

No. 1—Defence to a suit for accounts

In the Court of the Civil Judge at Agra

ORIGINAL SUIT No. OF 19

Alfred Addison *Plaintiff*

versus

Muhammad Husain *Defendant*

Written statement on behalf of the above defendant

1. The defendant admits that he was appointed by the late George Addison as his agent, as alleged in para. 1 of the plaint.

2. The defendant denies the allegation in para. 2 of the plaint that he began collecting rents from 1328 Fasli. Under verbal orders of the said late George Addison, the defendant began collecting rents from 1329 Fasli and has been collecting them ever since.

3. The defendant does not admit that the said George Addison died intestate, but admits that the plaintiff is his son and has obtained letters of administration. The late George Addison has left a will, dated January 15, 1918, bequeathing all his property, movable and immovable, to his wife Sarah Addison, and the plaintiff is not therefore entitled to sue as the representative of the said George Addison.

4. The defendant denies the allegation in para. 4 of the plaint that he has not rendered account of the money received by him. The defendant did render to the said late George Addison, regularly at the end of every year, full and correct accounts of all collections made by the defendant, upto the year 1330 Fasli, and has paid to him whatever was found due from the defendant.

5. The defendant denies the allegation in para. 4 of the plaint that the plaintiff ever requested the defendant to render to him any accounts. The defendant is, and always has been, ready and willing to render accounts of his collections from the year 1331 Fasli, to the legal representative of the said George Addison.

(Sd.) Muhammad Husain

I, Md. Husain, declare that the contents of paras. 1, 2, 4 and 5 of the above written statement are true within my personal knowledge. The allegation that the late George Addison has left a will bequeathing all his property to his wife is verified on information received and believed by me to be correct. Verified at Agra this the day of .

(Sd.) Faiyaz Ali, Vakil

(Sd.) Muhammad Husain

No. 2—Defence to a suit on account stated

1. The defendant admits the allegations in para. 1 and 2 of the plaintiff.

2. The defendant admits the allegations in para 3—of the plaint that Ram Lal went to the plaintiff's shop on April 20, 1923, and stated an account in writing and signed a balance of Rs. 2,462 in the plaintiff's *Khata bahi*, but does not admit the allegation that the said Ram Lal understood the accounts on each side. The said Ram Lal accepted, without checking or understanding it, the account as given to him by the plaintiff

3. The defendant asserts that in the account as shown in the plaintiff's account-books and as given by the plaintiff to the said Ram Lal there were certain substantial errors of calculation, and the rates at which the plaintiff purchased *arhar* for the defendant firm as given in the plaintiff's account-book were false and known by the plaintiff to be false, and the plaintiff entered or got them entered in his account-books fraudulently to cause injury to the defendant firm.

Particulars of the fraudulent entries

<i>Baisakh Sudi 8th, 1978</i> ..	{ The market rate of <i>arhar</i> was Rs. 3 per maund. Plaintiff has charged Rs. 3-4-0 per maund on 200 mds. purchased for the defendant. Difference—Rs. 50
<i>Jeth Badi 19th, 1978</i> ..	{ The market rate of <i>arhar</i> was Rs. 3-6-0. Plaintiff charged Rs. 3-12-0 on 300 maunds purchased for the defendant. Difference—Rs. 112-8-0

Particulars of errors

<i>Baisakh Badi 7th, 1977</i> ..	{ Commission at As. 12 per md. on 500 maunds of <i>arhar</i> comes to Rs. 375. Plaintiff has charged Rs. 475. Difference—Rs. 100
<i>Jeth Sudi 5th, 1977</i> ..	{ Price of 400 maunds of <i>arhar</i> at Rs. 3-11-0 per maund comes to Rs. 1,475. Plaintiff has charged Rs. 1,525. Difference—Rs. 50
<i>Magh Sudi 15th, 1978</i> ..	{ Price of 200 maunds of sugar at Rs. 21-8-0 per maund sent by defendant firm comes to Rs. 4,300. Plaintiff has credited only Rs. 3,300. Difference—Rs. 1,000

Total difference in favour of defendant—Rs. 1,312-8-0.

4. The defendant denies that he has not paid anything since April 20, 1923. The defendant paid, through the said

Ram Lal, a sum of Rs. 1,500 to the plaintiff on April 24, 1923.

No. 3—Defence to a suit by an agent for money paid on behalf of the principal

1. The defendant denies that interest was agreed to be paid at annas 10 and says that it was agreed to be 8 annas per cent per mensem. The defendant admits the rest of the allegations in para. 1 of the plaint.

2. The defendant admits the allegations in paras. 2, 3 and 5 of the plaint.

3. The defendant admits that by letter, dated November 30, 1924, he instructed the plaintiff to sell the said 200 bags of wheat at the market rate, but does not admit that the defendant sold the said bags of wheat. The plaintiff had secretly, and against the directions of the defendant, sold the said 200 bags of wheat on November 12, 1924, at Rs. 4-8-0 per maund and must account to the defendant for the profits which have accrued by the sale.

No. 4—Defence to an agent's suit about khatti transactions

1. The defendant admits the allegations in para. 1 of the plaint.

2. The defendant denies the existence of the custom alleged by the plaintiff in the first sentence of para. 2 of the plaint as authorizing a commission agent to sell the *khattis* purchased by him for his principal. The defendant denies that there is any custom to pay anything on account of contribution to school or servant's expenses or on account of correspondence expenses. He admits the custom about payment of commission, brokerage, charity and *Goshala*. The defendant admits the custom about payment of interest as alleged in the 3rd sentence of para. 2 of the plaint.

3. The defendant admits the allegations in para. 3 of the plaint.

4. The defendant denies the allegations in para. 4 of the plaint that the plaintiff had expressly stated that the purchase would be subject to the conditions mentioned in para. 2 or that the defendant had expressly agreed to all or any of those conditions.

5. The defendant admits that the rate began to fall soon after the aforesaid purchase, but does not admit that on *Bhadon Sudi* 15, 1979 it was as stated in para. 5 of the plaint.

6. The defendant admits the allegations in para. 6 of the plaint.

7. The defendant does not admit that no reply was received by the plaintiff or that the plaintiff then or ever sent a reminder through a special messenger or otherwise. The defendant sent a letter to the plaintiff on September 9, 1922, through his *munim*, Mutsaddi Lal, denying the plaintiff's right to call for more advance money, and expressly forbidding the plaintiff to sell the *khattis* without the defendant's instructions.

8. The defendant denies that he sent his *munim*, Mutsaddi Lal, to the plaintiff on November 15, 1922, or on any day after September 9, 1922. The defendant does not admit that the said Mutsaddi Lal ever asked the plaintiff to sell the *khattis*. Alternatively, the defendant says that he had given no authority to the said Mutsaddi Lal to ask the plaintiff to sell the aforesaid *khattis*.

9. The defendant does not admit that the plaintiff sold the *khattis* to Ram Bilas or to any other person, or that the plaintiff sold them at the rates alleged in para. 9 of the plaint. Alternatively, the defendant pleads that the sale being unauthorised and against the defendant's instructions, the plaintiff cannot recover any loss sustained thereby.

10. The defendant does not admit any of the allegations in para. 11 of the plaint.

No. 5—Defence to suit by the assignee of a debt

1. The defendant admits the allegations in para. 1 of the plaint.

2. The defendant does not admit that Ram Prasad, obligee of the bond, assigned the debt to the plaintiff as alleged in para. 2 of the plaint, or at all.

3. In the alternative, the defendant pleads that the plaintiff being a pleader, the assignment of the debt alleged by him is against law, and the plaintiff cannot enforce this claim.

4. The defendant admits that he has not paid the debt to the plaintiff, but pleads that he has paid the whole of the debt to the said Ram Prasad on April 13, 1925.

No. 6—Defence to a suit to enforce an arbitration award

1. The defendant admits each and everyone of the allegations in paras. 1-3 of the plaint.

2. The award of the arbitrator is vitiated by misconduct of the arbitrator.

Particulars of misconduct

- (a) The defendant asked the arbitrator to see the book of Bansi Lal *bhat* and to examine the said Bansi Lal in proof of the pedigree set up by the defendant, but the arbitrator refused to do so.
- (b) The defendant cited three witnesses, Ramanand, Bul Chand and Abdur Rabb, all of whom are employees of the Municipal Board, Aligarh. The arbitrator abused them and threatened to dismiss them if they gave evidence in the case, and the said witnesses thereupon refused to give evidence.
- (c) The arbitrator had fixed April 2, for hearing evidence of defendant's two witnesses, Rahmat and Sant Lal, but left for Allahabad before the date fixed, and did not return until the 12th. On April 12, he called the parties for hearing his award. Before the arbitrator delivered the award, the defendant represented that his two witnesses had yet to be

examined, but the arbitrator replied that it was not necessary, and at once pronounced his award which he had already written.

- (d) The arbitrator has based his conclusions largely on his private inquiries made behind the back of the defendant.

No. 7—Defence in suits on bonds

(Form No. 2, Appendix A, C. P. C.)

1. The bond is not the defendant's bond.
2. The defendant made payment to the plaintiff on the day according to the condition of the bond.
3. The defendant made payment to the plaintiff, after the day named and before suit, of the principal and interest mentioned in the bond.

No. 8—Defence to suit on an instalment bond

1. The defendant admits all the allegations made by the plaintiff in para. 1 of the plaint.

2. Of the allegations in para. 2 of the plaint, the defendant admits that he paid the first instalment on due date, that he did not pay the 2nd instalment on due date, and that the plaintiff accepted payment of the said instalment three days after the due date. But the defendant denies that the plaintiff had verbally or otherwise agreed to waive the benefit of the acceleration clause in the bond. On the contrary, the plaintiff had expressly told the defendant that he would not accept payment by instalments any longer.

3. Under the acceleration clause of the bond, the whole money became payable on July 1, 1922, and the suit is therefore barred by Article 75, Schedule II, of the Limitation Act.

4. The defendant denies the allegations in para. 3 of the plaint that the defendant has not paid anything. The defendant has made the following payments :

Rs. 300 on November 25, 1922.

Rs. 150 on December 15, 1922.

Rs. 200 on February 20, 1923.

Total Rs. 650.

No. 9—Defence to a suit for cancellation of a sale-deed

1. The defendant admits the allegation in para. 1 of the plaint.

2. The defendant denies that he made the representations alleged in paras. 2, 5 and 6 of the plaint, or that the plaintiff assented to a proposal of executing a power of attorney or that she asked the defendant to have a power of attorney drawn up.

3. The defendant admits that on December 22, 1924, he took to the plaintiff a document, but denies that he represented to the plaintiff that it was a general power of attorney or that he induced the plaintiff by such representation to affix her thumb mark to it. The plaintiff had, by her free will and consent, agreed to sell her share in village Nalagarh to the defendant in consideration of a debt of Rs. 15,000 due to the defendant from the plaintiff's deceased husband Ram Lal on a pronote, dated January 4, 1922. The sale-deed was drawn up under the plaintiff's instructions and she put her thumb mark to it, well knowing that it was a sale-deed.

4. The defendant admits that he took the Sub-Registrar of Ghazipur to the plaintiff's house but denies that the said Sub-Registrar did not read out or explain the contents of the deed to the plaintiff. The said Sub-Registrar had read out the deed and had fully explained to the plaintiff its purport and effect, and the plaintiff had admitted before him the execution of the sale-deed, and the said Sub-Registrar then registered the said deed according to law.

5. The defendant denies that the plaintiff has now learnt that the deed was a deed of sale and says that she has well known that fact ever since she executed the said deed.

6. The defendant admits the allegation in para. 7 of the plaint.

No. 10—Defence to a suit for cancellation of will

1. The defendant admits the allegations in paras. 1—3 of the plaint.

2. The defendant does not admit the allegation in paras. 4 and 5 that the said Ram Prasad did not execute the said will or that he was not in his proper senses when he executed it, or that he was incapable of understanding his affairs, or that he was totally unconscious or could not hear or talk to anyone on April 14, 15 or 16, 1925.

3. The said Ram Prasad duly executed the said will, while he was in full possession of his senses, and fully able to understand the effect of it.

No. 11—Defence to a suit for contribution

1. The defendant admits the allegation in para. 1 of the plaint regarding the purchase of the house, but denies that he and the plaintiff remained jointly in possession of the said house. The defendant asserts that the house remained in the exclusive possession of the plaintiff from the date of purchase to the date of delivery of possession to Sri Narayan.

2. The defendant admits the allegation in para. 2 of the plaint.

3. The defendant denies the allegation in para. 3 that he and the plaintiff agreed to defend the suit jointly, but admits that the plaintiff incurred all the costs. He does not admit that the costs incurred by the plaintiff amounted to Rs. 200.

4. The defendant admits the allegation in para. 4 relating to the obtaining of a decree by Sri Narayan, but does not admit that Sri Narayan realized Rs. 4,000 or any other sum, from the plaintiff.

5. The defendant had come to know that Ram Narayan was not the adopted son of Sant Lal, and was not therefore willing to defend the suit of Sri Narayan. The plaintiff was bent on defending it and prevailed upon the defendant to join, and the defendant did join, in the defence on the

express agreement made verbally by the plaintiff on the—, that the defendant would not be liable either for the cost of the defence or for the costs of Sri Narayan.

No. 12—Defence to a suit for refund of decree-money

1. The defendant admits the allegation in para. 1 of the plaint that the plaintiff paid to him Rs. 800 but does not admit that the payment was made on account of the said decree or that the defendant agreed to credit the money towards the said decree.

2. The defendant admits the allegation in para. 2 of the plaint.

3. The plaintiff owed on the date of the said payment, and still owes, to the defendant money under a bond, dated June 14, 1923.

4. The plaintiff did not, at the time of making the said payment, intimate to the defendant to which debt the payment was to be applied. The defendant appropriated and credited the payment towards the debt due under the said bond.

No. 13—Defence to a suit for dower

1. The defendants admit the allegation in para. 1 of the plaint about the plaintiff's marriage, but do not admit that the dower fixed was Rs. 10,000. The defendants allege that the plaintiff's dower was only Rs. 2,000, out of which Rs. 1,000 was prompt, and Rs. 1,000 was deferred.

2. The defendants admit each of the allegation in paras. 2, 3, and 5 of plaint.

3. The defendants deny the allegations in para. 4 that the dower debt has remained unpaid.

4. Mt. Ilahi Jan had demanded her prompt dower from Khuda Baksh, in December, 1908 and the said Khuda Baksh had paid her Rs. 1,000 on account of the prompt dower in the said month of December, 1908.

5. In the alternative, the defendants plead that the said Khuda Baksh, refused to pay her the prompt dower in Decem-

ber, 1908 and the claim for that is now barred by Article 103 of the 2nd Schedule to the Limitation Act.

6. At the time of the death of the said Khuda Baksh, Musammat Ilahi Jan had verbally relinquished her dower debt, and the said debt has thus been discharged.

7. In the alternative, the defendants plead that Musammat Ilahi Jan took possession of the house at No. 25, Cotton Street, Calcutta, in lieu of her dower debt, and as the profits of that house, being Rs. 2,400 a year were more than her legal share in the whole income of the assets of the said Khuda Baksh, (such legal share being only Rs. 1,900 a year), the plaintiff must, in any case, account for the profits of the said house realized by her and by Musammat Ilahi Jan.

No. 14—Defence in suits on guarantees

(*Form No. 3, Appendix A, C. P. C.*)

1. The principal satisfied the claim by payment before suit.

2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 15—Defence to a suit on an implied indemnity

1. The defendant admits each and everyone of the allegations made in paras. 1, 2, and 4 of the plaint.

2. The defendant admits that Ram Chandra has obtained a decree against the plaintiff but does not admit that the plaintiff has paid Rs. 2,543, or any other sum to the said Ram Chandra.

3. The defendant did offer Rs. 2,000 to Ram Chandra in full discharge of his mortgage, but the said Ram Chandra replied that Rs. 2,864 was due to him and refused to accept any smaller sum.

4. On August 20, 1921, the defendant informed the plaintiff of the aforesaid facts whereupon the plaintiff promised to provide Rs. 864 and to go with the defendant to the said Ram Chandra to have the mortgage redeemed.

5. The defendant has always been ready and willing to pay Rs. 2,000 but the plaintiff did not provide Rs. 864 nor did he go with the defendant to the said Ram Chandra to have the mortgage redeemed.

No. 16—Defence to a suit on a judgment of an Indian State

1. The defendant admits the allegations in para. 1 of the plaint.

2. The defendant admits that the court of the Subordinate Judge of Sawai Madhopur was duly constituted but does not admit that it had jurisdiction to hear the said suit. The promissory note on which the suit was instituted was executed at Agra where the defendant resided permanently at the time of the institution of the suit, and no part of the cause of action arose within the jurisdiction of the said Subordinate Judge.

3. The said pronote bore a stamp of 1 anna only, though under the Stamp (Amendment) Act a duty of 2 annas was payable, and could not therefore be used in evidence.

4. The said judgment was obtained by fraud. The following are the particulars of fraud.

(For specimen of such particulars, *see* plaint No. 194)

No. 17—Defence to a suit for ejectment

1. The defendant admits that he held the house in suit as the plaintiff's tenant, but does not admit that his tenancy commenced on March 25, 1922. The said tenancy commenced on April 1, 1922.

2. The defendant admits service of the notice alleged in para. 2 of the plaint, but does not admit that the plaintiff duly determined the defendant's tenancy thereby. The notice did not expire with the month of tenancy and was not according to law.

(NOTE :—In U. P. the notice need not end with the month of tenancy (Act 24 of 1954). So this defence is not

available in U. P. But the notice must be for a period of 30 and not 15 days.)

3. The defendant admits that he has not paid the rent claimed by the plaintiff. The same was tendered to the plaintiff out of court on October 25, 1924, but the plaintiff refused to accept it. The defendant paid into court the sum of Rs. 210 on January 31, 1925.

No. 18—Defence to a suit for ejectment on ground of denial of title

1. The defendant admits each and everyone of the allegations in paras. 1 and 3 of the plaint.

2. The defendant admits the allegations in para. 2 of the plaint that in his written statement in suit No. 22 of 1925, he stated that the plaintiff had no title to the house but denies that he stated that the defendant was the owner of the said house.

3. The plaintiff is not the owner of the said house, but the owner of it is one Sayyid Muhammad Husain of Burdwan and the plaintiff is the local manager of the said Sayyid Muhammad Husain, and had let the house to the defendant expressly on behalf of, and as agent of the said Sayyid Muhammad Husain.

4. In the alternative, the alleged forfeiture was waived by the plaintiff on August 20, 1925, by accepting rent for the month of July, 1925, from the defendant.

No. 19—Defence to a suit for wrongful dismissal

1. The defendant admits the allegations in paras. 1, 2, and 4 of the plaint.

2. The defendant admits the allegation in para. 3 of the plaint that he dismissed the plaintiff by a letter dated, June 20, 1925, without giving any notice as required by the terms of employment, but denies that the dismissal was wrongful.

3. The defendant was induced to take the plaintiff in his employment by the plaintiff, on June 10, 1924, verbally

representing and warranting to him that he, the plaintiff, was then reasonably competent to perform the service for which he was engaged, viz., that of helping the defendant in editing the daily paper, "The Tribune," whereas the plaintiff was not then, nor has he since been reasonably competent to perform the said service; and therefore the defendant rescinded the contract and dismissed the plaintiff, (or the plaintiff misappropriated Rs. 500 which he had received on behalf of the defendant and did not credit the same in the account register which he kept in discharge of his duties, and was thus guilty of gross misconduct, and therefore the defendant rescinded the contract and dismissed the plaintiff).

4. The defendant offered to Pay Rs. 350 to the plaintiff on account of pay' upto June 10, but the plaintiff declined to accept it. The defendant pays into court the said sum in full satisfaction of the plaintiff's dues.

No. 20—Defence in any suit for debt

(Form No. 4, Appendix A, C. P. C.)

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :—

1907, January 25	..	..	..	..	150
„ February 1	..	..	..	..	50
			Total	..	<u>200</u>

2. As to the whole [or as to Rs. , part of the money claimed] the defendant made tender before suit of Rs. , and has paid the same into Court.

No. 21—Defence to suit under Sec. 69 Contract Act

1. The defendant admits that in execution of decree No. 545 of 1921, Ram Lal attached the sugar-cane crop. The said crop belonged to the defendant.

2. The defendant does not admit that the plaintiff paid Rs. 563-2-9 or any other sum as alleged in para. 2 and denies that the said payment, if made, was made in order to have the plaintiff's crop released. The said payment, if made, was made voluntarily and fraudulently in order to establish a false claim to the said crop.

No. 22—Defence of a junior member of a Hindu family to suit for redemption of mortgage by manager

1. The defendant does not admit the mortgage alleged by the plaintiff in paras. 1 and 2 of the plaint.

2. The defendant admits that the mortgaged property is ancestral, that the defendant and the alleged mortgagor were members of a joint Hindu family and that the latter was the manager of the said family.

3. The defendant does not admit that the alleged mortgage was made for the necessity alleged in the plaint, or for any legal necessity (or, the defendant does not admit the alleged antecedent debt), [or (if the mortgagor was not the father) the defendant does not admit that the alleged antecedent debt was taken for the necessity alleged in the plaint or for any legal necessity,] [or (if the mortgagor was the father) the alleged antecedent debt was taken to pay off gambling losses (*Give particulars*).

4. In the alternative, the defendant denies that there was any necessity to borrow money at the rate of interest stipulated in the mortgage-deed.

No. 23—Defence to suit for foreclosure

(*Form No. 11, Appendix A, C. P. C.*)

1. The defendant did not execute the mortgage.

2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*).

3. The suit is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.

4. The following payments have been made, viz. :—

	Rs.
(Insert date).—.....	1,000
(Insert date).—.....	500

5. The plaintiff took possession on the of and has received the rents ever since.

6. The plaintiff released the debt on the of

7. The defendant transferred all his interest to *A. B* by a document, dated

No. 24—Defence of a mortgagee claiming priority

On the.....the plaintiff orally represented to the answering defendant that his mortgage had been satisfied and that his mortgage-deed had been lost whereby the answering defendant was induced to advance money to defendant No. 1 on the security of the mortgaged property. The answering defendant therefore claims that the plaintiff's mortgage is postponed to the answering defendant's mortgage.

No. 25—Ditto

The mortgaged property was, prior to the mortgage in suit, mortgaged to one *A.B.* under a mortgage deed dated the.....and registered on the.....The answering defendant has redeemed the said mortgage of *A. B.* on the.....by paying to him Rs.....on account of his mortgage and claims to have acquired priority against the plaintiff.

No. 26—Defence to suit for redemption

(Form No. 12, App. A, C. P. C.)

1. The plaintiff's right to redeem is barred by article— of the second schedule to Indian Limitation Act, 1877.

2. The plaintiff transferred all his interest in the property to *A. B.*

3. The defendant by a document, dated the day of transferred all his interest in the mortgage-debt and property comprised in the mortgage to *A. B.*

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits).

No. 27—Defence to redemption suit

1. The defendant does not admit the allegation in the plaint that the plaintiff is the mortgagor and the defendant is the mortgagee of the property in suit.

2. The defendant does not admit the mortgage alleged in para. 2 of the plaint.

3. The defendant does not admit the allegations about deposit of the mortgage money under Sec. 83 or the issue of a notice against the defendant by the court. The defendant denies that any such notice was served upon him.

4. The suit is not maintainable without a tender of the mortgage money.

5. In the alternative, the defendant pleads that the suit is not maintainable without a previous offer of redemption made in the month of *Jeth*.

6. The amount of the mesne profits claimed is excessive.

No. 28—Defence claiming marshalling

Of the several items of the mortgaged property which the plaintiff claims to sell, the following items alone are mortgaged to the answering defendant and the answering defendant prays that the plaintiff should be required to marshal.

No. 29—Defence to a suit on a promissory note

1. The defendant admits that he executed a promissory note on December 6, 1923 for Rs. 1,000 and that he has not paid the same or any part thereof to the plaintiff.

2. The defendant denies that interest was payable under the said promissory note at 1 per cent per mensem. Under the promissory note as originally written, the defen-

dant had agreed to pay interest at 1 per cent per annum. The said promissory note has been materially altered by alteration of the word "*Salana*" into "*Mahana*" hence no suit is maintainable on it.

3. Under U. P. Act XLIII of 1923, a stamp of 4 annas was payable on the said promissory note, and, as it bears a stamp of 1 anna only, a suit is not maintainable on its basis.

No. 30—Defence to a payee's suit on a Hundi

1. The defendant admits the allegations in para. 1 of the plaint.

2. The defendant does not admit the allegation in para. 2 that the plaintiff presented the Hundi to the said firm Lachmi Narayan Panna Lal at their place of business at Kanpur after maturity, or at all, or that the said firm refused to honour or accept it.

3. The defendant does not admit that the plaintiff sent any notice of dishonour to the defendant. The defendant did not, at any rate, receive any such notice.

4. The said Hundi was drawn against the price and charges of 100 bags of wheat which the plaintiff had agreed to despatch to the defendant within 10 days of receiving the said Hundi, but the plaintiff has not despatched the said or any bags within the said time or at all.

No. 31—Defence to a suit for dissolution of partnership

1. The defendant admits the partnership agreement alleged in para. 1 of the plaint but denies that it was agreed that the parties should contribute equally to the capital and should share equally the profit and loss. The plaintiff contributed 1/3 rd and defendant contributed 2/3rds towards the capital, and they agreed to share the profits and losses in the same ratio.

2. The defendant admits the giving of a loan of Rs. 2,000 to his nephew and the borrowing of Rs. 1,500 from the Allahabad Bank, but denies that these acts amount to

any misconduct. Both the giving and the taking of the said loans were done with the consent and approval of the plaintiff.

3. The partnership has, on January 4, 1925, been by mutual consent and by a verbal agreement, dissolved and the accounts have been settled and squared between the parties on the said date.

**No. 32—Defence to a suit against Railway Company
for delay in delivery**

1. The defendant admits each of the allegations contained in paras. 1 and 2 of the plaint.

2. The defendant admits that the goods were actually delivered by the plaintiff on September 25, 1925, but denies that the defendant Company negligently delayed them in transit.

3. The defendant does not admit that goods had deteriorated or lost their value.

4. In the alternative, the defendant pleads that the alleged damage was not the direct effect of the delay.

5. The delay caused was not due to any negligence of the defendant, but was due to the plaintiff addressing the bags illegibly so that "Jamna Bridge" was actually read as "Jamna Gunj."

**No. 33—Defence to a suit for non-delivery of goods,
pleading protection of Risk Note**

1. The defendant admits each of the several allegations made in paras. 1 and 2 of the plaint.

2. The said goods were received by the defendant company to be carried under a special contract contained in the Risk Note Form B (or A) signed by the plaintiff's agent Ram Lal, at Gorakhpur, at the time of delivering the goods on May 12, 1925.

3. The said contract was subject to certain just and reasonable conditions, one of which was that the defendant company should be held blameless and free from all responsi-

bility for any loss of the consignment from any cause whatever, except upon proof that such loss arose from the misconduct of the defendant company's servants.

4. The non-delivery of the said 40 bags was due to their having been lost.

5. The said loss did not arise from the misconduct of the defendant company's servants.

No. 34—Defence to a suit for price of goods sold

1. The defendant admits the agreement about sale and purchase of grain and sugar alleged in para. 1 of the plaint, but denies that it was agreed that the defendant should pay the price on delivery or should pay interest at 7-8 per cent per annum or at any other rate. It was verbally agreed on the said January 4, 1924, at the time of the agreement of sale of grain and sugar that an account should be made and settled, on December 31 every year, and this suit has been filed before December 31, 1924.

2. The defendant admits that all the goods mentioned in the plaintiff's particulars were sold and delivered to him except that 50 bags of sugar were not sold and delivered on April 20, 1925. Only 40 bags of sugar were sold and delivered by the plaintiff to the defendant on the said date.

3. The defendant admits that no price was fixed between the parties. The defendant also admits the correctness of the plaintiff's particulars of the amount due to him, except that on April 20, 1925, the price and other costs of 40 bags of sugar only, and not of 50, should be debited against the defendant and therefore the amount due to the plaintiff for the price and other costs of goods sold and delivered to the defendant should be Rs. 3,900 only.

No. 35—Defence in suits for goods sold and delivered

(Form No. 1, App. A, C. P. C.)

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.

3. The price was ,not Rs.

[or]

4.	}	Except as to Rs.	, (same as)	{	1.
5.					2.
6.					3.

7. The defendant [or A. B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to C. D., the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 36—Defence to a suit for not accepting goods purchased

1. The defendant admits the allegations contained in para. 1 of the plaint, but pleads that, by a previous letter dated January 10, 1925, the defendant had asked the plaintiff to send him only first class white sugar, and the letter of January 14, 1925 referred to in para. 1 of the plaint was intended to refer to the same quality of sugar.

2. The defendant admits the allegations in para. 2 of the plaint, but says that the sugar sent by the plaintiff was not first class white sugar. It was brown sugar of very inferior quality for which there was no market at Multan.

3. The defendant admits that he refused to accept delivery of the sugar sent by the plaintiff and pleads that he did so as the sugar was not of the quality indented for.

No. 37—Defence to a suit for not accepting delivery of part and for price of part accepted

1. The defendant admits the allegation in para. 1 of the plaint, but adds that the 18 cases of coloured glazed paper were sold by sample and were warranted equal to sample. The said warranty was verbal and was given on August 20, 1920.

2. The defendant admits acceptance of delivery of 6 cases of the glazed paper alleged in para. 2 of the plaint, but pleads that they were not of the description or quality

warranted and were inferior to sample, and the defendant refused to accept the same and gave notice to the plaintiff that they remained on the defendant's premises at the plaintiff's risk.

3. The plaintiff refused to deliver glazed paper according to sample on November 20, 1920, but insisted that he would deliver paper of the same quality as that sent in October and November, 1920, and it was such glazed paper only which the plaintiff was ready and willing to deliver and which the defendant refused to accept.

4. The defendant admits that he did not pay the price of the glazed paper delivered by the plaintiff.

No. 38—Defence to a suit for price of articles prepared to order

1. The defendant admits the allegations in para. 1 of the plaint and pleads that the said necklace was required by the defendant, as the plaintiff well knew, for presentation to his niece on the occasion of the latter's marriage which was fixed for January 1, 1926, and that the time of one month fixed by the agreement was therefore of the essence of the contract.

2. The defendant admits that the plaintiff did make a necklace and offered it to the defendant on January 10, 1926, but denies that it was of the specification agreed upon. The said necklace was studded with rubies of $1\frac{1}{2}$ rattis each instead of 2 rattis, and was different from the agreed pattern in the following particulars :—(*Points of Difference*).

No. 39—Defence to suit for specific performance

(*Form No. 13, Appendix A, C. P. C.*)

1. The defendant did not enter into the agreement.

2. A. B. was not the agent of the defendant (*if alleged by plaintiff*).

3. The plaintiff has not performed the following conditions—(*Conditions*).

4. The defendant did not—(*alleged acts of part performance*).

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matters—(*State why*).

6. The agreement is uncertain in the following respects—(*State them*).

7. (*or*) The plaintiff has been guilty of delay.

8. (*or*) The plaintiff has been guilty of fraud (*or misrepresentation*).

9. (*or*) The agreement is unfair

10. (*or*) The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10), (*or, as the case may be*).

12. The agreement was rescinded under conditions of Sale, No. 11 (*or by mutual agreement*).

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement of the alleged breaches, or show whatever other ground of defence he intends to rely on, e. g. the Indian Limitation Act, accord and satisfaction, release, fraud etc.*)

No. 40—Defence to a vendor's suit for specific performance

1. The defendant admits all the allegations contained in para. 1 of the plaint.

2. The defendant does not admit that the plaintiff required the money by December 20, 1920, and denies that the defendant had notice of this fact or that time was intended to be of the essence of the Contract.

3. The said contract was, by mutual verbal agreement, on December 19, 1920, rescinded and the earnest money paid by the plaintiff to defendant was forfeited.

4. In the alternative, the defendant denies that the plaintiff was ready and willing on the date fixed to execute

a proper deed of sale or had called upon the defendant to perform his part of the contract, or that the defendant failed to do so. The defendant was always ready and willing to perform his part of contract, but the plaintiff himself neglected to execute a proper deed of conveyance.

5. In the alternative, the defendant pleads that plaintiff is not the sole owner of the property he contracted to sell and cannot transfer to the plaintiff a right free from doubt and dispute. The defendant has learnt, after the contract, that the plaintiff's brother Babu Ram has also a share in the said property.

No. 41—Defence to a suit for breach of contract to do work within time

1. The defendant admits the allegations in para. 1 of the plaint.

2. The defendant admits that the plaintiff brought the car to the defendant but does not admit that the plaintiff told him that he required the car to be in perfect running order by April 25, in order to carry passengers from Rawalpindi to Srinagar, or for any other purpose, or that the plaintiff told the defendant that, if the car was not in perfect running order by that date, the plaintiff would lose a profit of Rs. 100 a week, or any profit.

3. The defendant admits that he agreed to put the car into running order, but denies that he agreed to do so by April 25, or by any other date. The defendant agreed to do so within reasonable time.

4. The defendant admits that he did not deliver the car to the plaintiff on April 25, but did so on June 8. He says that June 8 was a reasonable time

5. The defendant contends that the damages claimed are too remote in law.

Defence in Suits on Tort

No. 42—Defence in all suits for wrongs

(Form No. 6, Appendix A, C. P. C.)

Denial of the several acts [or matters] complained of.

No. 43—Defence to a suit for damages to plaintiff's crop by defendant's cattle

1. The plaintiff's field No. 512 is situated on the highway leading from the *abadi* of the village to the pasture land.

2. The said bullocks were being lawfully driven by the defendant's servant along the said highway, and they strayed upon the plaintiff's field, without any negligence on the part of the defendant or of his said servant.

No. 44—Defence to a suit for damages for wrongful attachment before judgment

1. The defendant admits the allegations in paras. 1 and 2 of the plaint.

2. The defendant denies that he obtained the said order maliciously or without any reasonable and probable cause or knowingly made a false allegation that the plaintiff was intending to dispose of his stock-in-trade. The defendant had a reasonable cause for making the application and the said allegations.

Particulars : The plaintiff's neighbours Ram Lal, Bishen Lal, and Karta Kishen informed the defendant on August 1, 1924, that the plaintiff was intending to dispose of his stock-in-trade and had negotiated with them. The defendant believed this information to be true.

3. The plaintiff had made an application under Sec. 95, C. P. C. which was dismissed by the Munsif of Agra by an order, dated January 14, 1925. The present suit is therefore not maintainable.

No. 45—Defence of defendants 2-4 to suit for conspiracy to defraud a decree-holder

1. The defendants admit the allegations in para. 1 of the plaint.

2. The defendants do not admit that the plaintiff obtained a decree against defendant No. 1 or that the plaintiff made any attempts to execute it or that he obtained a warrant of attachment of any bullock, house or grain.

3. The defendants deny that they conspired with the defendant No. 1 to defraud the plaintiff and to prevent him from recovering his decretal money by means of execution, or for any other purpose.

4. The defendants' acts alleged in para. 5 of the plaint are admitted but it is denied that they, or any of them were done in pursuance of any conspiracy.

5. The defendants Nos. 2 and 3 purchased the bullocks, and defendant No. 4 purchased the house from defendants in good faith and for value.

6. Defendant No. 2 purchased the grain in good faith for price paid in cash to the defendant No. 1 and rightfully took it away to his own village.

7. The defendant admits the allegations in para. 6 of the plaint.

8. The plaintiff's decree is still capable of execution and the plaintiff has suffered no damage.

9. In the alternative, the defendants contend that the damages claimed are too remote in law.

No. 46—Defence in suits for infringement of copyright

(Form No. 8, Appendix A, C. P. C.)

1. The plaintiff is not the author (*assignee, etc.*)
2. The book was not registered.
3. The defendant did not infringe.

No. 47—Defence in suits for detention of goods

(Form No. 7, Appendix A, C. P. C.)

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows :—

1907, May 3. To carriage of the goods claimed from Delhi to Calcutta :—

45 maunds, at Rs. 2 per maund	..	Rs. 90
-------------------------------	----	--------

**No. 48—Defence to a suit for movables inherited
by the plaintiff**

1. The defendant does not admit that Rahim Baksh is owner of the whole property entered in the plaint schedule. He was owner only of six cows and one she-buffalo and 20 maunds of wheat.

2. The defendant does not admit that he left no heir except the plaintiff or that the defendant was his kept mistress. The defendant was his lawfully wedded wife.

3. The defendant denies that she took possession of the whole of the property entered in the plaint schedule or has retained it since. She took possession of six cows and one she-buffalo and 20 maunds of wheat only and has retained the said cows and she-buffalo since. She sold the said 20 mds. of wheat for Rs. 120 and spent that money on the funeral expenses of the said Rahim Baksh. A full account of such expenses has been given in the schedule attached to this written statement.

4. On November 4, 1920, shortly before his death, the said Rahim Baksh verbally gave the said cows and the she-buffalo to the defendant in satisfaction of her dower debt which was Rs. 501.

5. In the alternative, the defendant has been in possession of the said cows and she-buffalo in lieu of her dower debt of Rs. 501.

**No. 49—Defence to a suit for obstruction of a
right of way**

1. The defendant admits the allegation in para. 1 of the plaint.

2. The defendant denies that the plaintiff was entitled to the right of way alleged in paras. 2 and 3 of the plaint.

3. The plaintiff has not enjoyed the alleged right of way for 20 years or at any time within two years of the institution of this suit.

4. If he has so enjoyed it, such enjoyment has not been as of right, but has been a secret enjoyment without the knowledge of the defendant and his predecessors-in-title.

(Or, the said enjoyment was with the permission and licence of the defendant. The defendant gave the said permission verbally to the plaintiff in the month of April, 1912, when the plaintiff had planted new trees in his grove).

If easement of necessity is claimed state.—The alleged way is not absolutely necessary, as the plaintiff can reach the highway from his grove by another way, *viz.*, across the open space of ground belonging to the plaintiff and lying to the North of the defendant's grove No. 513).

5. The defendant admits obstruction of the plaintiffs' alleged way, but denies that the said act was unlawful.

No. 50—Defence to a suit for obstruction of light and air

1. The plaintiff has not enjoyed the use of the light and air for 20 years before the suit.

2. The plaintiff has not enjoyed the use of the light and air within two years of the institution of this suit. The defendant's wall obstructing the light and air of the plaintiff was built in, and has been in existence, since February 1922.

3. The plaintiff had three large windows in his said room on the East side, through which sufficient light and air used to enter the plaintiff's house. The said windows existed for more than 30 years, and the plaintiff has himself closed them two months before bringing this suit.

The defendant denies that the plaintiff's house was rendered unfit for comfortable habitation by the defendant obstructing the plaintiff's western windows. On the other hand, it has been rendered so by the plaintiff closing his eastern windows.

(Or, the defendant denies that the plaintiff's house has been rendered unfit for comfortable habitation, or that the obstruction complained of prevents him from carrying on

his business as a tailor, or has materially diminished the value of the house. The house receives a sufficient quantity of light and air by two windows in the northern wall).

**No. 51—Defence to a suit for interference
with a right of privacy**

1. The defendant denies that the plaintiff has been using his house adjoining the defendant's house as a residence for his ladies, for 50 years or for any considerable period. The said house was formerly used as a godown for storing plaintiff's timber and fodder, and the plaintiff turned it into a residential house for his family only one year ago, after the defendant had started construction on his upper storey.

2. In the alternative, the defendant contends that the plaintiff's house is visible from the public road on the north which is on a much higher level than the houses of the parties, and from the windows of the neighbouring houses belonging to Radha Mohan, Gopal Prasad and Dwarka Prasad, and the right of privacy claimed by the plaintiff has not been substantially enjoyed.

No. 52—Defence to a suit for false imprisonment

1. The defendants admit the allegations in para. 1 of the plaint.

2. The defendant No. 1 denies having arrested the plaintiff or having detained him for two hours or for any length of time, or having given him into the custody of the defendant No. 2. On the occasion mentioned in para. 2 of the plaint, Khuda Baksh, the son of defendant No. 1 asked the plaintiff not to go near the tent of defendant No. 1. The plaintiff thereupon began to abuse the said Khuda Baksh, and when the said Khuda Baksh asked him not to use abusive language, the plaintiff threatened to beat him, and flung his shoe at him. The defendant No. 1 was then sitting in his tent and was talking to defendant No. 2. On hearing the plaintiff abusing the said Khuda Baksh and on seeing him flung his shoe at the said Khuda Baksh, both the

defendants came out of the tent and defendant No. 2 asked the plaintiff to give him his name and residence. The plaintiff refused to give his name and residence, and defendant No. 2 thereupon, lawfully and gently, and without using any unnecessary force, arrested the plaintiff and detained him in the tent of defendant No. 1 for about an hour in order that his name and residence might be ascertained, and when the same could not be ascertained, the defendant No. 2 produced the plaintiff before the nearest Magistrate at Bulandshahr.

3. The defendants deny that the plaintiff offered to give his correct name and address to the defendant No. 2 or to execute a bond for appearance before the Magistrate. The rest of the allegations in para. 3 of the plaint are admitted.

No. 53—Defence to a suit for moving a police officer to make arrest

1. The defendant admits that he made a report of theft, against the plaintiff but denies that he requested the Sub-Inspector to arrest the plaintiff.

2. The defendant admits the allegations in para. 2 of the plaint.

3. The defendant contends that he had a reasonable and probable cause for believing that the plaintiff had committed theft, and made the said report honestly believing, on credible information received, that the plaintiff had committed the theft of his gold watch.

Particulars of reasonable and probable cause

The plaintiff was a servant of the defendant. The defendant missed his gold watch in the morning of May 14, 1924. The plaintiff was then absent and when the defendant questioned his other servant, Ram Din and Alla Baksh, they told the defendant that they saw the plaintiff in possession of Rs. 100 on the night of May 13, and, on being questioned, the plaintiff had told them that he had borrowed the money from one Shanker Lal. The defendant

then questioned Shanker Lal who informed the defendant that the plaintiff had pledged a gold watch with him for Rs. 100 on the evening of May 13, but had redeemed the same in the morning of May 14. The defendant searched for the plaintiff at the latter's house but could not find him.

No. 54—Defence to a suit for libel

(Admission and apology)

1. The defendant admits all the allegations of the plaint except damages.

2. The defendant published the said libel without actual malice. The defendant very much regrets that he published the said libel and tenders a sincere and unqualified apology to the plaintiff for the same.

3. The defendant has published the said apology at a prominent place in the issue of the "Meerut Herald" for September 10, 1925. (The defendant may, if he likes, pay into court full costs of the suit and any reasonable amount which he considers proper, and may then add—

4. The defendant pays into court full costs of the plaintiff's suit and Rs. 100 on account of damages and says that that sum is sufficient to satisfy the plaintiff's claim).

No. 55—Defence of justification to suit for libel

1. The defendant admits all the allegations contained in the plaintiff except that by the publication of the said words the plaintiff has been injured in his credit.

2. The words complained of are true in substance and in fact.

No. 56—Defence to a suit for malicious prosecution

1. The defendant admits the allegations in paras. 1 and 2 of the plaint.

2. The defendant denies that the charge against the plaintiff was false, or was brought maliciously or without a reasonable and probable cause.

3. The charge brought by the defendant against the plaintiff was true.

4. Even if the charge was false, the defendant had a reasonable and probable cause for believing it to be true.

Particulars: The plaintiff used frequently to visit the defendant's house, even in the absence of the defendant. On the date the defendant's wife ran away, the plaintiff also left the village. Several residents of the village told the defendant that they had seen the plaintiff going with the defendant's wife from the defendant's village towards the Railway Station and the defendant believed these persons.

5. The special damages claimed or loss of business are, even if suffered, not the direct consequence of the plaintiff prosecution and are too remote in law.

No. 57—Plea denying that the defendant was the prosecutor

The defendant denies that he prosecuted the plaintiff. The defendant has simply made a report to the police of what he believed to be the true facts and took no further active part in the plaintiff's prosecution.

No. 58—Defence in suit for injuries caused by negligent driving

(Form No. 5, App. A, C. P. C.)

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to , of Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said stable keepers.

2. The defendant does not admit that the said carriage was turned out of Middleton Street negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 59—Defence in a suit for negligent and rash driving

1. The defendant admits the collision alleged in para. 1 of the plaint but denies that it was due to any negligence on the part of the defendant's coachman.

2. The accident was caused by contributory negligence of the coachman of the plaintiff.

Particulars : The plaintiffs' driver was, at the time of the accident, drunk and was driving at a very rapid speed. When the defendant's coachman turned round the corner and saw the plaintiff's tonga, he pulled up the reins of his horses and shouted to the plaintiff's coachman to stop, but the plaintiff's coachman did not listen and did not slacken the speed of his horses, who came running into the defendant's *landau*, causing the accident complained of.

3. The defendant does not admit the injuries to the person of the plaintiff and to his horse and *tonga*, as alleged in para. 2 of the plaint.

No. 60—Defence to a suit for injuries received in a Railway collision

1. The defendant admits the allegations in para. 1 of the plaint.

2. The defendant denies that the collision was caused by the negligence of the defendant's servants either at Mansurpur or at Muzaffarnagar.

3. The collision was due to the result of an inevitable accident.

Particulars of the accident; (state facts showing how the collision occurred and to what it was due).

No. 61—Defence in suits relating to nuisances
(Form No. 10, App. A, C. P. C.)

1. The plaintiff's lights are not ancient (*or deny his other alleged prescriptive rights*).

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3. The defendant denies that he or his servants pollute the water [*or do what is complained of*].

[If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i.e., whether by prescription, grant, or what.]

4. The plaintiff has been guilty of laches of which the following are particulars :—

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First Complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., limitation as to past damage*].

No. 62—Ditto

1. The defendant admits the allegations in para. 1 of the plaint, (*or, the defendant denies that the piece of land to the east of the defendant's house belongs to the plaintiff. The said piece of land belongs to the defendant*).

2. The defendant does not admit that the *mori*, the spouts or the door alleged in para. 2 of the plaint have been constructed in September last or that the defendant's act in running water through the *mori* or discharging water through the spouts or passing through the door is wrongful.

3. The defendant claims (in the alternative) a right of easement to do the acts alleged in para. 2 of the plaint, on the said piece of land.

The following are the particulars of the said right :

- (i) The defendant has been running the water of his latrine through a *mori*, and has been discharging the rain water of his roof through three water spouts on the said land, for over 20 years before this suit, as of right and without interruption.
- (ii) The defendant for over 20 years before this suit, enjoyed, as of right and without interruption, a way on foot from the defendant's house over the said piece of land to the public highway to the east of the said piece of land and back from the said highway over the said piece of land to the defendant's house
- (iii) The eastern wall of the defendant's house had fallen down during the last rains and has been rebuilt by the defendant in the first week of December 1923, and the *mori*, the water spouts and the door have been constructed in the said wall at identically the same place at which they existed in the old wall at the time the said old wall fell down.

No. 63—Defence to a suit for seduction

1. The defendant does not admit that Smt. Ramo was the wife of the plaintiff and denies that the defendant knew that she was the plaintiff's wife.
2. The defendant denies the allegation in para. 2 of the plaint
3. The defendant admits that he received Smt. Ramo and has ever since harboured her at his house but denies that he did so wrongfully or that he has detained her or that he refused to deliver her to the plaintiff.
4. The said Smt. Ramo came to the defendant's house of her own accord and asked for protection and shelter, telling a pitiable tale of her sufferings, and the defendant gave her protection from motives of pure humanity.

No. 64—Defence to a suit for slander (*general*)

1. The defendant did not speak or publish the said words.
2. The said words did not refer to the plaintiff.
3. (The special damage alleged in the plaint is not sufficient in law to sustain the claim).

**No. 65—Special defence to claim in a suit
for slander**

1. The defendant admits that he spoke and published two words set out in para. 1 of the plaint to Babu Ram Prasad, Babu Bikhari Lal and Babu Ram Narayan, but denies that he did so to any other person.

2. The said words are true in substance and in fact.

3. Babu Ram Gopal, Babu Amrit Lal and Hafiz Abdul Karim, former patients of the plaintiff who were on intimate terms with the plaintiff, had told the defendant that the plaintiff was a man of immoral character, and the defendant honestly believed the information. On February 8, 1925, the friends of the defendant asked defendant's opinion as to the professional skill and the moral character of the plaintiff, and the defendant spoke and published the words complained of to the said three persons in reply to their questions, in the *bonafide* belief that the said words were true, and without any malice towards the plaintiff. Such publication was therefore privileged.

**No. 66—Defence to claim in a suit
for slander (*Continued*)**

1. The defendant admits the allegations in paras. 1 and 2 of the plaint.

2. The defendant does not admit that he spoke or published any of the words set out in para. 3 of the plaint.

3. The defendant did not mean, and was not understood

to mean, what is alleged in para. 5 of the plaint. The said words were incapable of conveying the alleged meaning or any other defamatory or actionable meaning.

4. The said words, without the said alleged meaning, are true in substance and in fact. The work was very badly done and the defendant broke the contract in many important particulars.

Particulars

(a) *Elgin Road* : The *Kankar* used was of an inferior kind. It was not properly metalled. The *kankar* was found loose at several places.

(b)

(c)

5. The chairman of the Buildings and Roads Sub-Committee moved that the plaintiff should be paid the money due to him under the contract. The defendant opposed the motion and made a speech. If, in the course of the speech, he spoke the words alleged in para. 3 of the plaint, he did so in the *bonafide* discharge of his duty as member of the said Sub-committee, without any malice towards the plaintiff in the belief that what he said was true, and the words were published only to the members of the said Sub-Committee who had a corresponding interest and duty in the matter. The occasion was therefore privileged.

6. The said words are a fair and *bonafide* comment on matters of public interest, *viz.*, the condition of the roads within the limits of the Allahabad Corporation and the claim of the plaintiff to be paid by the said Corporation for making the said roads.

7. The defendant does not admit that the plaintiff was, in consequence of the said statement, injured in his credit and reputation, and that the Zila Parishad of Allahabad and the Zila Parishad and Municipal Board of Mirzapur have ceased to employ him as a contractor in consequence of the above statement or for any other reason.

No. 67—Defence in suits for Infringement of Trade Mark

(Form No. 9, Appendix A, C. P. C.)

1. The alleged trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 68—Defence to a suit for injury to animal

1. The defendant admits the allegation in para. 1 of the plaint.

2. The defendant did not intentionally shoot the plaintiff's horse. The horse was shot on account of a pure and inevitable accident, without any negligence on the part of the defendant.

Particulars : (State facts showing how the gun accidentally went off).

No. 69—Defence to a title suit for possession

1. The defendant denies that the plaintiff is the owner of the house in suit or that he was in possession at any time within 12 years before the suit.

2. The defendant denies that he broke open the lock of the plaintiff's house and entered into possession of the said house on November 5, 1924 or on any other date within 12 years before the suit.

3. The suit is barred by Art. 142 of the 1st Schedule of the Limitation Act.

No. 70—Defence to a similar suit by a Gaon Sabha against a person in possession of a house in the Abadi

1. The defendant admits the allegations in paras. 1 and 2 of the plaint.

2. The defendant does not admit that Rameshwar singh abandoned the house. He really sold the house to the defendant by a registered sale-deed dated 19th April, 1953

and put the defendant in possession. Since then the defendant has been in possession.

Or

The defendant does not admit that Rameshwar Singh died heirless and the house escheated to the State. Sri Hanuman Singh son of Vikram Singh is the own nephew of Rameshwar Singh being the son of his brother and is his heir at law and in his presence the plaintiff cannot claim any rights in the house.

Defence in other suits

No. 71—Defence in Administration suit by Pecuniary Legatee

(Form No. 14, Appendix A, C. P. C.)

1. B's will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs. , and the testator had some movable property which the defendant got in, and which produced the net sum of Rs.

2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immovable property to the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts, and sent a copy thereof to the plaintiff on the , day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the cost of this suit.

**No. 72—Defence to a suit for setting aside
an adoption**

(Pleading husband's authority to the wife)

1. The defendant denies that Jamna Prasad never gave any authority to Smt. Ramo to adopt the defendant or any other boy. The said Jamna Prasad did give, by his will executed on January 14, 1912, an authority to Smt. Ramo to adopt any boy from the family of the said Jamna Prasad. (Or, the said Jamna Prasad did give, verbally, a few hours before his death, on January 20, 1913, an authority to adopt any body from the family of the said Jamna Prasad).

2. The defendant is of the same family as the said Jamna Prasad.

3. Smt. Ramo adopted the defendant under the said authority on November 20, 1916.

No. 73—Ditto

(Pleading custom against the ordinary rule of the Hindu Law)

1. The defendant admits that Jamna Prasad did not give any authority to his wife, Smt. Ramo to adopt the defendant or any other boy.

2. Amongst the Jains, of the Uttar Pradesh there is an immemorial custom, which is reasonable and has been followed without interruption, that a widow can adopt without any previous authority from her deceased husband.

3. The parties are Jains.

**No. 74—Defence to a suit for possession against
a transferee of a Hindu widow**

1. The defendant admits the allegations in paras. 1 and 3 of the plaint.

2. The defendant admits the pedigree given in para. 2 of the plaint so far as it goes, but says that it is incomplete in as much as it does not show the following facts :—

(a) Smt. Piari had, after the death of Ram Kishan, given birth to a posthumous son Dhani Ram. Dhani Ram married one Smt. Ram Kali.

(b) Har Narayan had a third son, Piarey Lal, who had a son, Raj Narayan, who had a son, Sri Narayan. Sri Narayan has left a daughter Smt. Pirano.

3. The defendant does not admit that all persons in the plaintiff's family nearer to Ram Kishan than the plaintiff had died before Smt. Piari. Sri Narayan was alive at the time of Smt. Piari's death and was the nearest reversioner. The plaintiff is not, therefore, the heir of Ram Kishan.

4. It is admitted that, on the death of Ram Kishan, Smt. Piari entered into possession as widow, but on the birth of Dhani Ram the property vested in him, and on his death, it devolved on Smt. Ram Kali, but, in spite of this Smt. Piari remained all along in adverse possession and has become absolute owner by such possession for over 12 years when she sold it to the defendant.

5. In the alternative, the defendant pleads that the sale was made to pay off the debt of Ram Kishan, due on a bond, dated June 4, 1902, to one Tarachand, and was therefore justified.

No. 75—Defence to a suit for declaration of the invalidity of a widow's transfer

1. The defendant admits the allegations in paras. 1 and 2 of the plaint.

2. The defendant admits that Ram Kishan died in 1920, and, on his death, defendant No. 1 entered into possession, but not that she entered into such possession as his widow. The said Ram Kishan bequeathed the property in suit, by a will, dated August 14, 1918, absolutely to defendant No. 1, and defendant No. 1 entered in possession as absolute owner under the said will.

3. The defendant does not admit the pedigree given in para. 4 of the plaint, and says that the plaintiff is not connected with the family of Ram Kishan.

4. In the alternative, the defendant pleads that Ram Bihari is not colluding with the defendant and that the plaintiff cannot sue in the lifetime of Ram Bihari.

5. The defendant admits that defendant No. 1 has sold the property to him but not that she did so without a legal necessity. The sale was made to pay off Government revenue due from her husband for the year 1327 F. and to pay the expenses of a pilgrimage to Gaya for the benefit of the soul of the said Ram Kishan.

No. 76—Defence to a suit for setting aside a father's alienation

1. The defendant admits the allegations in paras. 1 and 3 of the plaint.

2. The defendant denies that the property was the joint family property in which the plaintiff had any interest. It was the self-acquired property of defendant No. 2.

3. The defendant denies that the mortgage was made without a legal necessity or that there was no necessity for the rate of interest stipulated.

4. The mortgage was made to meet the expenses of the marriage of Satyavati, daughter of defendant No. 2.

(Or, the defendant No. 2 owed a debt to one Chand Prasad under a bond, dated June 4, 1918, and the mortgage was made to pay off the said debt).

(Or, the defendant denies that the antecedent debt was incurred for the purposes of gambling).

(Or, the defendant had, before advancing money to defendant No. 2, made proper and *bona fide* inquiries as to the existence of the aforesaid necessity and did all that was reasonable to satisfy himself as to existence of such necessity).

5. The rate of interest stipulated in the mortgage-deed is what was, at the time, generally prevalent in the market (or, was, at the time and under the circumstances a fair and reasonable one.)

6. The plaintiff had not been born when the said mortgage was made, and the only other members of the family of defendant No. 2 at the said time were the plaintiff's uncles and elder brother, and the mortgage was made with the consent of the said uncles and brothers.

No. 77—Defence to a suit for recovery of family property sold in execution of a decree against the father

1—2. As in the last precedent.

3. The defendant denies that the defendant No. 2 had any *badhni* transaction with defendant No. 1 or made the mortgage to pay off any debts incurred in such transaction or to raise money for drinking. (Or, the defendant denies that defendant No. 2 maintained a mistress Smt. Putli or any other mistress, or that he made the said mortgage to pay off debts incurred for the purpose of maintaining any such mistress).

No. 78—Defence to a wife's suit for maintenance

1. The defendant admits that plaintiff is his wife.

2. The defendant admits that he married a second wife, but denies each and every one of the allegations of the alleged cruelty to the plaintiff made in para. 2 of the plaint.

3. The plaintiff was leading an unchaste life, and when the defendant remonstrated with her, she voluntarily and without the consent or permission of the defendant, left the defendant's house and has since, without any lawful excuse, refused to return to the defendant's house. She cannot therefore claim maintenance.

4. The plaintiff is still leading an unchaste life.

Particulars of unchastity :—

The plaintiff has an immoral connection with one Ram Prasad. She has given birth to an illegitimate son begotten of the said unlawful connection.

5. The defendant admits the allegation in para. 3 of the plaint that the income of the defendant's property is Rs. 15,000, but says that he is heavily indebted, and under the circumstances, cannot afford more than Rs. 50 a month as plaintiff's separate maintenance.

No. 79—Defence to a widow's suit for maintenance

1. The defendants admit the allegations in paras 1, 2 and 3 of the plaint.

2. The defendants admit that they have been withholding maintenance from the plaintiff but deny that they have been doing so wrongfully. The plaintiff cannot therefore claim any arrears of maintenance.

3. The plaintiff contracted, 4 years ago, a second marriage, contrary to the custom of her community with one Ram Gulam, son of Ram Pratap of Bara Banki.

4. The defendants deny that the income of the family is Rs. 15,000 per annum. It is Rs. 6,000, and the plaintiff cannot claim more than Rs. 40 per mensem as maintenance.

No. 80—Defence to a suit for restitution of conjugal rights

1. The defendant admits that she is the wife of the plaintiff.

2. The defendant admits that she refuses to go to the plaintiff's house but does not admit that she does so without any lawful excuse.

3. The defendant left the plaintiff on account of the plaintiff's cruelty, and she fears that her life would be in danger if she returns to the plaintiff.

Particulars : The plaintiff leads an immoral life, keeps several prostitutes and is addicted to drinking. He is constantly in need of money for his immoral purposes. When the defendant was living with him the plaintiff used to press her to pay him money or to give him her jewellery, and when she refused to comply, he used to beat her, and to confine her in a room without giving her food for several

days and nights. On February 14, 1924, the day before she finally left the plaintiff, the plaintiff asked her to execute a deed of gift in his favour in respect of the property which she had inherited from her father, and on the defendant refusing to do so, the plaintiff beat her and threatened to kill her, and would have killed her had she not run away to her mother's house.

No. 81—Defence to a suit for partition

1. The defendant admits the pedigree given in the plaint, but does not admit that the parties are members of a joint Hindu family.

2. By a private partition, made verbally in the month of April 1912, between the defendant and Ram Sundar, father of the plaintiff, the whole family property had been partitioned and the parties have since been in separate possession of their shares.

3. In the alternative, the defendant claims to be allotted in his share, at the partition, the houses specified below, which have been in his possession since 1912.

4. The defendant has spent Rs. 4,000 in building the second storey of house No. 1 and in rebuilding the whole of the house No. 2.

5. Items.....are the separate properties of this defendant and are not part of the joint family properties as they were purchased by this defendant from his separate earnings as a Deputy Collector.

6. The plaintiff has left out from his claim 2 shops situate at Khatauli which also belonged to the ancestors of the parties. The suit for partial partition is not maintainable.

7. By a family custom which custom is reasonable, immemorial and has been followed in the family without interruption, the zamindari property of the family is an impartible estate which descends to the eldest member of the eldest branch of the family by primo-geniture and other members of the family have no right in it except of maintenance.

Therefore the claim for partition of item 1 of the properties in suit is not maintainable.

No. 82—Ditto

1. The defendants Nos. 2 and 3 admit all the allegations in the plaint.

2. Item 1 of the properties detailed in the plaint is a dwelling house. The answering defendants undertake to buy the 1/3rd share of the plaintiff and pray that the same be valued and directed to be sold to them and all necessary and proper directions given in that behalf.

No. 83—Defence to a suit for declaration of title

1. The defendant denies that the plaintiff is owner of the property in suit.

2. The defendant denies that the plaintiff is in possession of the said property. The defendant is in possession and the plaintiff's suit for a mere declaration is not, therefore, maintainable.

No. 84—Defence to a suit under O. 21, R. 63

1. The defendant denies that the plaintiff is the owner of the property in suit.

2. The defendant admits the allegations in paras. 2 and 3 of the plaint.

No. 85—Defence to a suit for pre-emption under Muhammadan Law

1. The defendant admits the sale of the property in suit by Rasula to the defendant but denies that the real consideration was Rs. 3,000. He asserts that Rs. 4,000 was the real consideration.

2. The defendant admits that the plaintiff is a *shafi-i-Sharik*, but denies that the defendant has no superior right. The defendant has a right of way through *sehan* land appertaining to the latter house, and is therefore a *Shafi-i-khalit* also.

3. The defendant does not admit that, immediately on hearing of the sale, the plaintiff declared his intention to assert a right of pre-emption.

4. The defendant denies that the plaintiff made the *talab-i-ishtishad* in the presence of the defendant, or at all.

**No. 86—Defence to Minor's suit for setting
aside a decree**

1. The defendant admits the allegations in paras. 1, 3, 4 and 7 of the plaint.

2. The defendant does not admit the allegations in paras. 2 and 5 of the plaint.

3. The defendant denies that Smt. Ram Dei was blind or deaf at the time of the defendant's rent suit, or was incapable of defending the suit on behalf of the plaintiff.

4. The defendant denies that the rent for the suit period had been paid up. The rent was in arrears and had not been paid before the said suit or at all. The plaintiff had no defence to the defendant's said suit for arrears of rent and has not been prejudiced in any way.

APPEALS

**No. 1—Form of heading of appeal from a decree on
original side (Calcutta)**

**IN THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL**

In appeal from its original civil jurisdiction

Appeal No.....

Suit No.....19

.....Appellant and (plff.) or (deft.)

versus

.....Respondent and (deft.) or (plff.)

*FORUM : So far as appeals from decrees in cases on original side of High Courts of Bombay, Madras and Calcutta are concerned, provision is made in their Letters Patent and Rules framed by them. Ordinarily an original suit is tried by a single judge and appeals against decrees

(insert name), the appellant above named appeals against the (decree) or order of the Honourable Mr. Justicein the above suit passed on theday of19 for the following amongst other reasons

(1), (2), (3) etc. (Here state grounds of (appeal))

Appeal No..... (By way of endorsement).

Suit No.....of 19.....

.....Appellant

versus

.....respondent.

No. 2—Ditto (Madras)

IN THE HIGH COURT OF JUDICATURE AT
MADRAS APPELLATE JURISDICTION

Appeal No.....of 19 .

Between

1. A B and

2. C D.....appellants.

And

1. E. F. and

2. G. H.....respondents.

On appeal from the judgment of the Honourable Mr. Justice..... dated the.....day of..... in the

therein lie to a Division Bench. For areas to which the Bengal, Agra and Assam Civil Court Act (XII of 1887) is applicable, the lowest court of civil jurisdiction is the court of the munsif whose pecuniary jurisdiction has been extended upto Rs. 5,000. Appeals from decrees passed by the court of Munsif lie to the District Judge but can be transferred by him for disposal to the Additional District Judge or the Civil Judge under him. In some States Civil Judges are called subordinate judges. In others there are no Courts of Munsifs and the lowest court of civil jurisdiction is the court of the subordinate judge IV class. Suits not triable by the court of the munsif are to be filed in the court of the civil judge. In U. P. State from the decrees of Civil Judges passed in cases valued over 20,000/ appeals lie directly to the High Court as first appeal. From cases valued at lesser amounts decided by the civil Judge, appeals lie to the District Judge and can be disposed of by him or Additional District Judge. From all decrees passed

ordinary original civil (or matrimonial, or admiralty)
Jurisdiction of this Court.

Suit No.....of 19.....

(or original petition No..... of 19.....)

Between

1. A. B. and
2. C. D.....plaintiffs.

And

1. E. F. and
2. G. H.....defendants.

No. 3—Memorandum of appeal from a decree
IN THE COURT OF THE DISTRICT JUDGE,
ALLAHABAD

.. .. .

Plaintiff Appellant

versus

.. .. .

Defendant-Respondent

First Appeal No.

1958

The above-named appeallant appeals to the court of the District Judge at Allahabad, from the decree of Sri Shanti Narain, Civil Judge at Allahabad in suit No. 550 of 1957, dated the 4th day of November, 1957, dismissing the

by District or Additional District Judges appeals lie only to the High Court. From the appellate decrees of Civil Judges, Additional District Judges or District Judges, second appeals lie to the High Court. Some Acts create courts of special jurisdiction and provision is made in them for filing of suits under the Act in specified Courts, e. g. the Hindu Marriage Act, the Zamindari Abolition and Land Reforms Act. In U. P. appeals against decrees passed by such courts lie to courts as provided for in these Acts.

Besides decrees, appeals lie against some orders of the Civil Courts also as mentioned in Or. 43, R. 1, C. P. C. such appeals lie to courts to which the decree passed by those courts would be appealable. No second appeals lie against decrees passed in appeal in such cases.

Court Fees : Appeals are included in the word "suit" for purposes of Court Fees Act (Sec. 2, clause IV). Ordinarily the same court fee is payable in appeal as would be payable in a suit claiming the relief prayed for in the appeals.

Limitation : Under Art. 116 of the Limitation Act of 1963, the limitation for appeals under the C. P. C. is 90 days from the date of the

appellant's suit, and sets forth the following grounds of objection to the decree from, viz.—

1. Because the finding that the payment of Rs. 100 was not made on account of interest as such is against the weight of evidence on the record and is incorrect.

2. Because the lower court erred in holding that the thumb mark of an illiterate payer under an endorsement of payment is not a sufficient compliance with the requirements of Sec. 20 of the Limitation Act.

3. Because the respondent's evidence of the alleged satisfaction of the bond is partial and unreliable, and should not have been believed.

4. Because there is no evidence on the record to support the finding that the interest clause was entered in the bond under undue influence.

5. Because the lower court did not act rightly in rejecting the appellant's application for permission to file certain documentary evidence on the date of hearing.

Value of the appeal : Rs. 525.

Relief : To set aside the decree of the lower court and to decree the plaintiff's claim with costs in both the courts.

(Sn.) M. AHMAD

Advocate for the appellant

No. 4—Memorandum of appeal from an order

The above named appellant appeals to the court of the District Judge of Muzaffarnagar, from an order of Mr. Rup

decree or order, if the appeal is to the High Court and 30 days if to any other court. Under Art. 117, if the appeal is from the decree or order of the High Court to the same court, the period is 30 days from the date of the decree or order. For leave to appeal as a pauper, Art. 113 provides that if the application is made to the High Court the period is 60 days and if to any other court, it is 30 days.

For appeals from decrees or orders passed by courts of special jurisdiction the period of Limitation is usually provided in the Act creating those courts.

Narayan, Munsif at Muzaffarnagar, dated November 4, 1957, refusing to set aside the *ex parte* decree passed in suit No. 502 of 1956, and sets forth the following grounds of objection to the order appealed from, viz.—

1. Because the lower court erred in holding that the service of summons on the appellant was sufficient in law.

2. Because the lower court erred in disbelieving the appellant's evidence that he did not know of the suit before September 1, 1957.

Value of the appeals : Rs. 200.

Relief : To reverse the order appealed from and to set aside the *ex parte* decree against the appellant.

The limitation for this appeal expired on December 24, 1959, which was a holiday. The appeal is, therefore, filed today, the next opening day.

(Sd.) A. C. BANERJI
Vakil for the appellant

No. 5—Memorandum of appeal from an appellate decree

The above-named appellant appeals to the Honourable the High Court at Allahabad against the appellate decree of Mr. A. Ashdown, District Judge at Meerut, dated July 14, 1958, confirming a decree of Mr. Brindaban, Civil Judge at Meerut, in suit No. 212 of 1957, dated January 15, 1958, dismissing the appellant's suit, and sets forth the following grounds of objection to the decree appealed against, viz.—

1. Because there is no evidence on the record to support the finding of the Courts below that the respondent had denied the plaintiff's title more than 12 years ago or at any time.

2. Because the lower court has erred in law in holding that the onus of proving his possession within 12 years lay upon the appellant.

3. Because the lower appellate court erred in law in holding that Sec. 11, C. P. C. barred the suit.

Value of the appeal : Rs. 525

Relief : That the Honourable Court will be pleased to set aside the decrees of the court below, and to decree the plaintiff's claim with costs.

(Sd.) F. CUMMING
Advocate for the appellant

I certify that I have examined the record and that in my opinion ground of appeal No. 1 is well founded in fact.

(Sd.) F. CUMMING

No. 6—Cross-objection under O. 41, R. 22, C. P. C.*

IN THE COURT OF THE DISTRICT JUDGE
AT AGRA

Ram Chandra *Plaintiff-Appellant*
versus

Kishori Lal *Defendant-Respondent*

The above-named respondent files this cross-objection against a part of the decree appealed from in this case and sets forth the following grounds of objection to the said part of the decree, viz.—

1. It is proved from the evidence on the record that the value of the 4 trees cut away by the respondent was only Rs. 45, and the lower court erred in holding that it was Rs. 106.

2. The lower court has erred in law in allowing interest to the plaintiff on the value of the trees from the date of cutting to that of the suit.

Relief : That the amount of the decree be reduced to Rs. 45.

*See ch. XVI.

REVISION***Application for Revision (S. 115, C. P. C.)**

Petition of revision under S. 115, C. P. C. against the decree of the District Judge of Benares dated 15th December, 1959, reversing the decree of the Munsiff of Varanasi dated the 25th July, 1959, passed in suit No. 315 of 1959 valued at Rs. 1,950/-.

Respectfully Showeth—

1. That the applicant was the plaintiff in the aforesaid suit which had been brought under S. 9 of the Specific Relief Act.

2. That the suit was decreed by the Munsiff but the District Judge on appeal has reversed the Munsiff's decree.

3. That under the law no appeal lay to the District Judge from the Munsiff's decree and the District Judge therefore exercised a jurisdiction which was not vested in him by law.

Therefore the applicant prays that this Hon'ble Court will call for the record of the case and set aside the said decree of the District Judge and restore that of the Munsiff and award him cost in all courts.

*Revision lies only on one of the three grounds mentioned in Sec. 115 and only when no appeal lies. See *S. Venkatagiri Ayyangar v. The Hindu Religious Endowments Board, Madras*, 1949 p. c. 156; *Jaychand Lal v. Kamala Kishan Chaudhry*, 1949 p. c. 239. In *Keshavdas Chamrid v. Radhakissen Chamria*, (1953 S. C. 23) the Supreme Court laid down only errors relating to jurisdiction fall within the scope of S. 115, which is concerned not so much with the decision itself as with the manner of arriving at it. In *Kr. Jagdish Pd. v. Ganga Pd.*, (1959 S. C. 492) the Court observed that where there are jurisdictional facts, the High Court can in exercise of its revisional powers, consider whether those facts were correctly decided. Revision does not lie from all interlocutory orders unless by that order a case is decided. "Case" is used in a very wide sense and is not confined to a suit or appeal only. It includes Civil proceedings and parts thereof. (*Maj. S. S. Khanna v. Brig. F. J. Dillon* 1963 A. L. J. 1068). In that case a decision on an issue regarding maintainability of the suit was held to be revisable by the Supreme Court. Errors of fact cannot be corrected in revision and those of law only if they can be related to the Courts jurisdiction to try the suit (*Pandurang v. Maruti* A. I. R. 1966 S. C. 153).

MISCELLANEOUS APPLICATIONS

(For Forms of heading of petition, See Chap. XVIII)

APPLICATIONS UNDER THE C. P. C.

No. 1—Objection about compensatory costs under

S. 35 A, C. P. C. (a)

(By defendant)

To the written statement, add, as the last paragraph—

“The plaintiff’s claim is false (or vexatious), (or, is false and vexatious) to the knowledge of the plaintiff and the defendant therefore claims special costs by way of compensation.”

No. 2—Ditto

(By plaintiff)

“The plaintiff begs to submit that the defence of payment put forward by the defendant is false and vexatious to the knowledge of the said defendant and therefore claims special costs by way of compensation.”

No. 3—Application for transfer of decree for execution (S. 39) (b)

1. The applicant is the holder of the decree passed by this court in suit No. 293 of 1959.

(a) Sec. 35 A, C. P. C. empowers courts to allow special costs by way of compensation. This section has so far been applied only to the Uttar Pradesh, Bombay, Madhya Pradesh, Assam and Bihar and Orissa.

Formerly it was necessary that a claim for special costs should have been made at the earliest opportunity. But the law has since been amended by Act 66 of 1956 and U. P. Act 24 of 1954 and this requirement is no longer necessary. Such costs can now be awarded even if claimed at a later stage including execution proceeding but excluding appeal; provided the court is satisfied about the justice thereof.

Such costs can be awarded even against the next friend of a minor (*Raj Kumar v. Mangad Rai*, 1930 A. L. J. 1295), but cannot be allowed in revision (*Cohen v. Sirdar Sahib Iqbal Singh*, 42 C. W. N. 658).

(b) The practice of making such an application in the form of an execution application has no justification. The ground on which the transfer is sought (being one of those mentioned in Sec. 39) should be mentioned, and the prayer should mention the name of the court to

2. The opposite party, against whom the said decree has been passed, actually and voluntarily resides (or, carried on business) (or, personally works for gain) at Jhajjar within the jurisdiction of the court of the Senior Subordinate Judge of Rohtak.

(Or, the opposite party against whom the said decree has been passed has no property within the jurisdiction of this court and has property within the jurisdiction of the court of the Senior Subordinate Judge of Rohtak).

(Or, the said decree directs sale of property situate outside the jurisdiction of this court and within the jurisdiction of the Court of the Senior Judge of Rohtak).

(Or, the property of the judgment-debtor to the said decree has been attached and put to sale by the Civil Judge of Meerut in execution of his decree No. 421 of 1958 and the applicant wishes to claim rateable distribution of the sale-proceeds to be realized by the said execution sale by the Civil Judge of Meerut).

The applicant, therefore, prays that his said decree be sent for execution to the court of the District Judge, Rohtak (or, to the court of the Civil Judge, Meerut).

**No. 4—Judgment-debtor's objection under Sec. 47
C. P. C. (c)**

*(Legal representative of the judgment-debtor) Objector
versus*

*(... .. Decree-holder) Opposite party
Objection under Sec. 47, C. P. C.*

The objector begs to raise the following objections to the execution application :—

which decree has to be sent. If the decree is to be executed by a court in a different district it should be sent to the District Court but if it is to be executed by a court in the same district it can be sent direct to the former (O. 21, R. 5). The Allahabad High Court has modified this rule by substituting the word "State" for "District" so that any court in the State of Uttar Pradesh can send a decree direct to another court in that State and need not send it to the District Court.

(c) All objections by one who is a party to the decree must be filed under this section and no separate suit is maintainable. A party

1. That the former execution application, from the date of which the present application is claimed to be within time, was not *bona fide* and was made simply for the purposes of limitation. The present execution application is therefore barred by limitation.

2. That the further interest claimed by the decree-holder has not been allowed by the decree.

3. That a portion of the property attached, *viz.*, *khewat* No. 16 in *mahal* Badam, is the personal property of the objector and not that of Sohanlal, judgment-debtor. The said property should be released from attachment.

4. That the rest of the property belonged to the joint Hindu family composed of the objector and his deceased father, the judgment-debtor, and is not liable to be attached in execution of his decree, because the debt for which the decree was passed was contracted by the said father in order to pay off losses incurred in *badhni* or grain gambling transac-

against whom a suit has been dismissed but whose name is retained is also a party (*Chhotelal v. Bhagwan Das*, 1933 (Nag.) 246), but one against whom a suit is given up or dismissed or who is exonerated by the plaintiff on the ground that he was wrongly joined is not a party (*U. Kala v. Ma Hnin*, 101 I. C. 749, 5 R. 110; *Jujbishta Pande v. Lakshmana*, 143 I. C. 476, 1933 (Mad.) 435, 1933 M. W. N. 527; *Parandhamayya v. Veerayya*, 1938 M. W. N. 1252; *Kailasa Reddiar v. Ponnammal*, (1961) 2 M. L. J. 119. A transferee of the decree-holder is decree-holder's representative (*Faqir Baksh c. Mt. Marian*, 168 I. C. 154, 1937 (Oudh) 365) and so a purchaser of mortgaged property pending suit on the mortgage is judgment-debtor's representative (*Lakshmi Narain v. Hanumayya*, 171 I. C. 925, 1937 (Mad.) 580; *Prameshri Din v. Ram Charan*, 169 I. C. 657, 41 C. W. N. 1130, 1937 A. W. R. 834, 1937 (P. C.) 260), and so also a transferee of the mortgagor after the mortgage decree (*Rashbehari v. Mabindi Pal*, 41 C. W. N. 1162, 1937 (Cal.) 565; also a transferee of attached property pendente lite (*Annamalai Mudalir v. Kuppusami*, (1962) 2 M. L. J. 336), but a receiver of judgment-debtor's estate is not (*Ghanshamads v. Shivaldas*, 30S. L.R. 288). A person sued in a representative capacity is a party even for the purpose of raising a claim in his personal capacity (*R. M. S. V. Chattyar v. Nayaing*, 1940 (Rang.) 27) and *vice versa* (*Shabaan v. Hemraj*, I. L. R. 1941 (Kar.) 474).

Such an objection cannot be dismissed summarily on the ground of delay (*Musbarfi v. Md. Mustaiabullah*, 111 I. C. 837, 1929 (Oudh 1.) As to whether an auction purchaser should be deemed a party or not there was considerable conflict of judicial opinion but this conflict has been set at rest by Act 66 of 1956 and U. P. Act 24 of 1954. Both these

tions made by him with the decree-holder in *Baisakh, Samvat* 1924.

The objector, therefore, prays that the above objections be allowed.

No. 5—Application under Sec. 95, C. P. C. (d)

1. The plaintiff applied for, and obtained, an order for attachment before judgment of the property of the defendant applicant, in suit No. 1370 of 1924, on December 20, 1924, and movable property of the applicant was attached, under the said order on December 26, 1924.

2. The said application was made on insufficient grounds. The allegations in the application that the applicant was going to dispose of the said property and that he had no other property were false.

3. The applicant had no intention of disposing of the said property and he had, and still has, a large property of the value of Rs. 10,000.

(Or, substitute the following for Nos. 2 and 3.

2. The said suit has been dismissed by the court on December 14 on the ground that the bond on which it was based was a forgery.

3. The bond was a forgery and the plaintiff had no reasonable or probable ground for instituting the suit).

Act declare an auction purchaser to be a party to the suit within the meaning of Sec. 47 in respect of the property purchased by him.

(d) An application can be made under this section even without first getting the order of attachment set aside, nor is an order making the conditional attachment absolute a bar to such application (*Palanisami v. Kaliappa*, 1939 M. W.N. 1084, 50 L. W. 640, 1940 (Mad.) 77). It should be proved that the attachment was applied for an insufficient grounds. It is not necessary to prove special damage. General damage can also be awarded (*Palanisami v. Kaliappa*, *ibid*). The mere passing of an order without actual attachment does not furnish any cause of action (*Mohammad Ismail & Co., v. Ashghra & Co.*, 183 I.C. 174, 1939 (Rang.) 260). But actual damages, if proved, as well as general damages can be awarded (*Palanisami v. Kaliappa* *Ibid*.); *Rehmanbux v. Dhallo Mal*, 1963 Raj. 177). Application does not lie against the next friend of a

The applicant prays that Rs. 1,000 may be awarded to him as compensation for the injury caused to him by the said attachment.

No. 6—Application under Sec. 144, C. P. C. (e)

1. On October 20, 1920, the opposite party obtained from this court a decree (being decree No. 269 of 1919) against the applicant for possession of the zamindari property and house specified in Schedule A annexed to this application, movable property mentioned in Schedule B, and cattle detailed in Schedule C, for mesne profits and for costs of the suit.

2. On November 15, 1920, the opposite party, under colour of the said decree, took possession of the said house.

3. By execution of the said decree, the opposite party obtained possession of the said zamindari property on May 15, 1921, and of the said movable property and the said cattle on June 20, 1921.

4. On February 25, 1922, the applicant deposited in court Rs. 5,261 on account of mesne profits and Rs. 2,565 on account of costs as directed by the said decree.

minor plaintiff though a separate suit will lie against him for damages (*Satayanarayan v. Anjareddi*, 1941 (Mad.) 779).

(e) The court has, under this section, power to restore the parties to their original position, therefore it can allow mesne profits also (*Tagore v. Mathurakant*, 173 I. C. 391, 1937 (Cal.) 478). But the Bombay High Court has held that mesne profits can be allowed only when it appears that the possession taken under the decree was wrongful (*Ganpat v. Navnitlal*, *ibid*). It has been held that even an uncerified payment made to decree-holder outside the court can be recovered under Sec. 144 (*Hanumanthappa v. Goolappa*, 48 L. W. 945). On the question whether this application is one for execution and is governed by the same rule of limitation there was a conflict of rulings. The Madras, Bombay and Patna High Courts and Oudh Chief Court ruled that if such applications should be regarded as applications for execution while the Allahabad, Lahore, Nagpur, Punjab and Calcutta High Courts held a contrary view and applied Art. 181 of the limitation Act. The conflict has been settled by the Supreme Court adopting the former view (*Mahaji Bhai v. Patel Manibhai* A. I. R. 1965 S. C. 1477). Art. 182 would therefore apply to such application under the old limitation

5. The said decree of this court was, on November 10, 1923, set aside by the Hon'ble High Court at Patna in First Appeal No. 351 of 1920.

6. The applicant claims by way of restitution—

- (a) Possession of the zamindari property and house mentioned in Schedule A.
- (b) Rs. on account of the mesne profits of the said zamindari property and house as per account given in Schedule D annexed to this application.

Act. Now Art. 137 of Act of 1963 will govern such applications and Limitation will be reckoned from the date of reversal of the decree. The time spent in preferring an unsuccessful second appeal will not be excluded (*Harimohan v. Parmeshwar*, 32 C. W. N. 971). Appeal from an order under this section requires *ad valorem* court-fee. Interest is allowed on money refunded under this section (*Hanuman v. National Bank*, 7 L. 232, 93 I. C. 954; *Surajmal v. Baniram*, 1941 (Nag.) 195; *Dalaram v. Ramanand*, 1929 (Pat.) 493); but Cal. H. C. has held that it should not be allowed if there is no such direction in the order of the final Court of appeal (*Birendra v. Surendra*, 1940 (Cal.) 260, 189 I. C. 30); Restitution can be allowed not only when decree is reversed in appeal but also when it is reversed on review (*Collector of Meerut v. Kalka Prasad*, 28 A. 665) or in a separate suit, (*Tangatur Subbarayaudu v. Yerraam*, 40 M. 299; contra, *L. N. Banarji v. K. L. & S. Co.*, 1941 P. C. 128; *Asbutosh v. Kunda*, 125 I. C. 645, 33 C. W. N. 908, 1929 (Cal.) 814, 57 C. 226 and *Chintamani v. Chunni Sahu*, 1 P. L. J. 43, 34 I. C. 747). Therefore when an order on claim objection is reversed in a suit under Order 21, Rule 63, cost paid under the order can be recovered under Sec. 144; *Chittori v. Chekka*, 1943 (Mad. 248). Nagpur H. C. holds that decree in plaintiff's favour in a suit under Order 21, R. 63 has the effect of setting aside also the order about cost in claim objection case (*Chintaman v. Govind*, 1938 (Nag.) 376), but Bom., All. and Rangoon H. Cs. differ from this (*V. E. R. M. Firm v. Mounng Pa.*, (1928) (Rang.) 248, 112 I. C. 285; *Raghunath v. Badri*, 6 All; *Ambala v. Punjabbai*, 1934 (Bom.) 129). Bom. and Rang. H. Cs., however, hold that if the plaintiff specifically prays for setting aside the order about cost, court can grant that relief also in the suit under Order 21, Rule 63. An application under this section can be made not only by the party on whose appeal the decree is reversed but also by any other party who is benefited by the decision in appeal (*Dhani Ram v. Sumer Chand*, 98 I. C. 1042, 1927 (All.) 182), if he was not a party to the appeal (*Gurnath v. Venkatesh*, 168 I. C. 629, 1937 (Bom.) 101). It can be made by a transferee of the appellate decree (*Jamini v. Dharamdas*, 33 C. 857), or against an attaching creditor of the decree varied (*Mangal Singh v. Jagat Ram*, 1944 (Pesh.) 44), but where surety is entitled, principal cannot apply (*Bal Krishan v. Ali Rasul*, 1938 A. M. W. J. 127). When judgment-debtor deposited money as security he cannot get interest on that money as Sec. 144 does not apply to such

- (c) Recovery of the movable property and cattle mentioned in Schedules B and C respectively or their value Rs. 4,262 as detailed in the said schedule.
- (d) Rs. on account of damages for being deprived of the use of the said movables and cattle as per account given in Schedule E attached to this application.
- (e) Refund of Rs. 7,826, with interest at 6 per cent per annum from February 25, 1922 to the date of realization.

cases (*Chelikant Sitarammayya v. Kappulu Pedda Venkamma*, 1941 (2) M. L. J. 768). The same H. C. applied Sec. 144 to a case of deposit of decretal money under O. 21, R. 89 (*Raman v. Kannan*, 1940 Mad.) 725, 1940 M. L. J. 340, but Allahabad and Oudh Courts have held that an application for refund of money deposited under O. 21, R. 89 is not one under Sec. 144 (*Raja Ram v. Mahommed Taqi*, 1942 (All.) 14). Restitution can be claimed even if possession was obtained, otherwise than by execution but under colour of the decree (*Suryadatta v. Jamanadatt*, 18 A. L. J. 729, 42 A. 568, 57 I. C. 148; *Narain Singh v. Bachu Singh*, 6 A. L. J. 551, 99 I. C. 952). Contra, *Brij Mohan v. Rameshar*, 183 I. C. 709, 1939 (Oudh) 273). Where the judgment-debtor to a decree for specific performance handed over the property to the decree-holder, he was held to be entitled to recover it under Sec. 144 if the decree is set aside in appeal (*R. H. Skinner v. Lt. J. R. R. Skinner*, 1943 (All.) 202).

Restitution must be granted if the decree is reversed. Right to retain possession (taken in execution) under another title arising during pendency of the litigation is no defence to an application under Sec. 144 (*Chandra Krishna v. Radha Krishna*, 108 I.C. 111, 5 O. W. N. 91. Also see *Binayak v. Ramesh Chandra* A. I. R. 1966 S. C. 948). Restitution is sometimes granted under the inherent power of the court even if the case does not fall under Sec. 144; (*Birendra v. Surendra*, 1940 (Cal.) 260, 149 I. C. 581) e. g., when decree is varied by compromise (*Sundarsana v. Gopala*, 1933 M. W. N. 641; *Beni Prasad v. Kundanlal* 150 I. C. 224, 1934 (Lah.) 322; *Sufal v. Surendra*, 60 C. L. J. 44; *Raghubanslal v. Solano*, 149 I. C. 365, 1934 (Pat.) 150; contra, *Mutsaddi v. Sultan*, 1933 A. L. J. 724, 1933 (All.) 745) or where a decree was shown to be a nullity as it was passed against a dead man (*Rama v. Narasimhalu*, 146 I. C. 564, 1933 (Mad.) 888 (1)), or where the sale in execution of decree against father is set aside in a separate suit by the sons (*Jogendranath v. Hira Sabu*, 1948 All. 252, 1948 A. L. J. 25), or when the decree is set aside in a separate suit by a court of Coordinate jurisdiction; (*Magbool Alam v. Mt. Khodaijia*, 1949 Pat. 133) or where defendant has paid money due on account of court-fee in a pauper suit under an order of the court which was reversed. (*Mahalakshma v. Ramayya*, 168 I. C. 717, 1937 (Mad.) 178).

**No. 7—Application for amendment of plaint,
judgment and decree (Sec. 152) (f)**

1. The applicant instituted a suit No. 293 of 1923 in this court for sale of certain mortgaged property.

2. The said property was described in the mortgage-bond as plots Nos. 476 and 477.

3. After the mortgage, the numbers of plots were altered at the settlement of 1325 Fasli, and the corresponding numbers of the mortgaged-plots are 320 and 321 respectively.

4. By an accidental mistake the plaintiff copied out the description of the property to be sold from the mortgage-deed and did not specify the new numbers in the plaint, and in the judgment and the preliminary and final decrees the property ordered to be sold is described as Nos. 476 and 477.

5. The mistake was detected at the time the applicant put in an application for execution.

The applicant prays that the plaint, the judgment, the preliminary decree and the final decree be amended by the substitution of Nos. "320" and "321" for "476" and "477".

Act 66 of 1956 makes Sec. 144 applicable to orders also as distinguished from decrees. U. P. Act 24 of 1954 makes this section applicable to reversal and variations whether brought about by appeal, revision or otherwise.

The bar of suit under Sec. 144 (2) C. P. C. applies to cases to which Sec. 144 applies and not to cases of restitution under the inherent powers of the court. *Jokhu Mal v. Sudama Mal*, 1955 All. 526.

(f) Such clerical or arithmetical errors or accidental mistakes can be corrected at any time as there is no limitation (*Mt. Santi v. Mulkh Raj*, 1937 (Lah.) 894. But inordinate delay may be a ground of rejecting an application for correction of the amount payable under a decree (*Nagedra v. Ambika*, 33 C. W. N. 959, 50 C. L. J. 12, 1929 (Cal.) 676). In this case the delay was of 18 months (*Monohar Chandra v. Sudhi Priya*, 41 C. W. N. 1330). Decree-holder's acceptance of payment of decretal amount is no bar to an application for amendment (*Munsuwamy v. Jagannath*, 1929 (Mad.) 830). Such amendmen's can be made by the court under its inherent powers, even if Sec. 152 does not apply, not only in the decree but in any other proceedings also. The error can be amended throughout the record (*Sheo Balak v. Sukhdeo*, 12 A.L.J. 285, 23 I. C. 344). Even consent orders can be rectified (*Karimunnissa Begum v. Kair Mir Jalaluddin Valde Mir Masum Ali Khan*, I.L.R. 1937 (Bom.)

No. 8—Application under O. 1, R. 8, C. P. C.

The humble petition of _____ under O. 1, R. 8, respectfully sheweth—

(1) That the applicants are the members of the sect of Dasa Jains of Delhi.

(2) That there are about 150 persons of that sect in Delhi.

(3) That the plaintiffs want to bring a suit, on behalf of all the members of the said sect, for the assertion of their right to worship at the Jain temple at Roshanpura, Delhi, and pray for permission for the same.

No. 9—Application for amendment praying for substitution of person as plaintiff

(O. 1, R. 10 (1) (g))

1. The applicant is the guardian of Ramnath minor, appointed under the will of Amarnath, deceased father of the said Ramnath.

837, 10 R.B. 252, 39 Bom. L.R. 915, 1937 (Bom.) 457, 172 I.C. 170). But the court cannot by such amendment alter a decree substantially by taking into consideration a document produced after the decree (*Bal Chand v. Narain Das*, 1938 A. L. J. 1080, 1938 A. W. R. (H. C.) 773). Nor can a decree be amended so as to allow future interest which was not allowed in judgment (*Thiruganana v. Venugopala*, 1939 M. W. N. 1165) 1940 Mad. 29, 50 L. W. 719). Where third parties acquired rights an amendment so as to affect those rights cannot be granted (*Laxman v. Maruti*, 184 I. C. 775, 1939 (Bom.) 389; *Joy Chandra v. Govinda Chandra*, 44 C. W. N. 708).

No application can be made by a purchaser of the decree (*Jai Bhagwan v. Om Prakash*, 182 I. C. 830, 1939 (Lah.) 255). It should be made to the court passing the decree and not to the executing court (*Krishnaya v. Meghraj*, 1940 (Bom.) 10). But where a court has ceased to exist and no successor court exists, the application may be made to execution court. *Gaya Singh v. Mst. Ram Piari*, 1955, All. 622. If a decree capable of execution has been passed by appellate Court, application should be made to it and not to original Court (*Zuleka v. Kulsum*, 1940 M. W. N. 834; *Durga Singh v. Wahid Raza*, 1964 A. L. J. 817; *Smt. Chandrakala Devi v. Central Bank of India Ltd*, 1959 Cal. 153; *Annappu Ramanna v. Panduri Sriramulu*, 1958 A. P. 768). *Koraga Shetty v. Sheik M. Ltatif* 1967 2 Mays. L. J. 317).

(g) The application should be supported by an affidavit.

2. The applicant honestly believed that this appointment as guardian under the will had the effect of constituting him an executor of the will by implication.

3. The applicant, in the above *bona fide* belief that he was executor under the will, brought this suit in his own name, as such executor, for recovery of property belonging to the estate of the said Amarnath.

4. The defendant objected in his written statement that the applicant was not the executor of the will by implication and was not entitled to use in his own name.

5. On this objection, the applicant consulted some eminent lawyers and has been advised that the defendant's contention is right.

6. The said Ramnath minor, being owner of the property under the will, is entitled to sue.

7. The applicant's interest is in no way adverse to that of the said minor, and the applicant is in every way fit to act as the minor's next friend.

The applicant prays that the name of the said "Ramnath son of Amarnath, Brahman of Kanpur, minor, through Chandra Kishore his next friend" be substituted for that of the applicant, as plaintiff.

No. 10—Application for amendment praying for substitution of a person as defendant

1. After the institution of this suit the plaintiff came to know from the village Patwari that Raj Kishore defendant No. 3 was already dead before the suit was filed.

2. The said Raj Kishore has left as his only heir a son named Ram Kishore. For adjudication of the plaintiff's claim it is necessary to implead the said Ram Kishore.

The plaintiff, therefore, prays that the name of Ram Kishore be substituted for Raj Kishore as defendant No. 2 and leave be given to the plaintiff to make consequential amendments in the body of the plaint (*or*, the following amendments may be made in the body of the plaint viz....)

**No. 11—Application for substituted service
(O. 5, R. 20)**

1. In the above case, the defendant is keeping out of the way for the purpose of avoiding service of summons.

(Or, the defendant is a *pardanashin* lady of high social position and cannot, therefore, be personally served).

2. The applicant prays for an order for substituted service of the summons in any manner the court thinks fit.

Affidavit

1. I make oath and say that the summons in this case was first issued to the defendant Ram Narayan at his house in village Ramnagar, and was returned unserved with the report that he had gone to his son in village Salarpur.

2. I make oath and say that when the summons was taken out for Salarpur four days later, it was returned with the report that the said Ram Narayan had gone to his second son in village Amethi.

3. I make oath and say that when the summons was taken to Amethi, it was returned with the report that Ram Narayan had gone to his own house.

4. I make oath and say that summons sent by post was returned with the endorsement "refused".

5. I make oath and say that I believe that Ram Narayan is intentionally keeping out of the way to evade service of the summons.

**No. 12—Application for striking out pleadings
(O. 6, R. 16)**

1. The following allegations in the plaint are scandalous and irrelevant to the issues involved in the case.

(a) In para. 1 of the plaint - "The defendant No. 1 has an illicit connection with defendant No. 2".

(b) In para. 4 of the plaint : "The wife of defendant No. 1 ran away with a servant, and that fact created a sensation in the village".

2. The following allegations are unnecessary for the decision of the issues involved in the case and are embarrassing to the defendant :—

(a) In para. 2 of the plaint : “The defendant is a man of loose character and has contracted heavy debts the amount of his present liabilities being about one lac of rupees.”

(b) In para. 6 of the plaint : “The defendant No. 1 has mortgaged most of his property.”

The applicant prays that the allegations specified above be ordered to be struck out from the plaint and the plaint amended accordingly.

No. 13—Application for rejection of plaint

1. This is a suit for setting aside a decree on the ground that it was obtained by fraud.

2. In para. 2 of the plaint the plaintiff has simply stated that the defendant has obtained the decree by fraud and no particulars of the alleged fraud have been given as required by Order VI, Rule 4, C. P. C.

The defendant prays that the allegation of fraud in para. 2 of the plaint be struck out and that as the plaint will not, without that allegation, disclose any cause of action it be rejected.

No. 14—Application for amendment of plaint

(O. 6, R. 17) (h)

1. The plaintiff is owner of the house in suit.

2. The plaintiff has brought this suit for possession of the said house on an allegation of the defendant's tenancy.

(b) The proper procedure is to obtain leave of the court and then to amend the plaint, instead of the present practice of asking the court to make the amendment. In this way it will not be necessary to specify the exact verbal changes that should be made in every paragraph of the plaint, but it is always desirable to submit the proposed amendments in explicit form (*Eusoof v. Niemeyer*, 1940 Rang. L. R. 603).

3. The defendant has denied his tenancy.

4. In the event of the issue of tenancy being decided against the plaintiff the suit is liable to be dismissed and the plaintiff will have to bring another suit on the ground of his title.

The plaintiff prays that he may be allowed to amend the plaint so as to make an alternative claim on the basis of his title as owner of the house. He is prepared to pay the necessary additional court-fee. The exact amendments which will be made in the plaint after leave is granted are set out in the annexure to this application.

No. 15—Another application for amendment

1. The plaintiff brought this suit for the price of certain trees cut away by the defendant from a grove No. 512.

2. The defendant denies plaintiff's ownership of the side grove, and the real question in controversy between the parties is therefore the right of ownership of the said grove.

3. It is necessary for the final determination of this question and to avoid multiplicity of suits to have the plaint amended.

The applicant prays that he may be allowed to amend the plaint so as to add the following relief as relief (a), renumbering reliefs (a) and (b) as (c) and (d).

“(a) A declaration that he is the owner of the grove described at the foot of the plaint.”

No. 16—Application for particulars (by defendant)

The plaintiff has not given in his plaint particulars of the following allegations and the applicant prays that he be ordered to give the necessary particulars specified below against each such allegation :—

<i>Para. Of the plaint</i>	<i>Allegation</i>	<i>Particulars required</i>
5.	Publication of the alleged libel	When, where, to whom, how and before whom, the publication was made.
6.	The plaintiff lost his credit and thereby suffered a damage of Rs. 20,000/-	How did the plaintiff lose his credit and with whom. Particulars of the amount of damages claimed.

No. 17—Application for particulars (by plaintiff)

The defendant has made certain allegations in his written statement filed on the....., but without giving any particulars; and the plaintiff prays that he be ordered to deliver particulars as follows :—

(1) *As to paragraph 8*, of the alleged payment of Rs. 800/- stating whether it was in one lump sum or in instalments, and, when, where, by whom, and to whom was the payment made.

(2) *As to paragraph 10*, of the alleged agreement, stating whether oral or in writing, if in writing identifying the document, if oral with whom, when and where made.

No. 18—Application under O. 9, R. 3 or 8, C. P. C.

1. One day prior to the date of hearing in the above case, the applicant was suddenly attacked by cholera and remained ill and unable to attend the court on the date fixed.

2. The applicant prays that the order of dismissal of the suit, dated January 4, 1925, be set aside.

No. 19—Application under O. 9, R. 13, C. P. C. (i)

1. That the applicant was one of the defendants in the above case and an *ex parte* decree has been passed against him on November 30, 1924.

(i) An affidavit should generally be filed in support of this application. The Lahore High Court has held that if an application is made

2 That he was prevented by the reasons disclosed in the annexed affidavit, which he claims were sufficient, from appearing when the suit was called on for hearing.

The applicant prays that *ex parte* decree passed against him on November 30, 1924 be set aside.

Affidavit in support of the above application

1. I make oath and say that I had to join a marriage ceremony of my sister's son on January 22, 1924, at Jabbalpur, and therefore I left my village on January 18, 1924 and returned to it on January 30, 1924.

2. I make oath and say that, on January 16, 1924, I had given my papers to Sri Chaman Lal, pleader, and had instructed him to file the *Vakalatanama* and written statement on my behalf on January 21, 1924, the date fixed for issues.

3. I am informed by Sri Chaman Lal, pleader, and I verily believe it to be true, that, on January 21, 1924, when the case was called on, Sri Chaman Lal was engaged in a Sessions case, before the Additional Judge at Kanpur.

4. I am informed by Sri Chaman Lal, and, verily believe it to be true, that when Sri Chaman Lal came to the court a few minutes later, he found the case had been decreed *ex parte*.

(A similar affidavit of Sri Chaman Lal may also be filed.

No 20—The like, on another ground

1 That the applicant was the defendant in above case, and an *ex parte* decree has been passed against him on November 30, 1924.

more than 30 days after the decree the date of applicant's knowledge of the decree must be alleged in the application, otherwise the court has no jurisdiction to entertain it (*Karam Singh v. Barkat Ram*, 109 I. C. 82.) If the decree is of a small cause court, the applicant should deposit the decretal amount or security for it as required by Sec. 17, Small Cause Court Act at the time making the application, and it has been held (*Jagannath v. Chet Ram*, 28 A. 470), that the defect will not be cured by subsequent deposit. The Oudh Chief Court has taken a lenient view and held that it will be sufficient if the deposit is made within limitation (*Narain v. Rudan*, 5 Luck. 294). The later decisions of the

2. That the summons for final hearing issued against the applicant was not duly served upon him.

[If the application is made more than 30 days after the decree add—

3. That the applicant came to know of the said decree on July 10, 1925 (this date should be one within 30 days next before the application)].

The applicant prays that the *ex parte* decree be set aside.

Affidavit

1. I make oath and say that no summons was served on me in this case.

2. I make oath and say that I did not know of the institution of the suit or of the passing of the decree until July 10, 1925.

3. I make oath and say that it was on July 10, 1925 that I learnt for the first time on receipt of a notice of execution under O, 21, R. 22, C. P. C. that a decree had been passed against me.

No. 21—Application for leave to deliver interrogatories (j)

The plaintiff prays for leave to deliver the interrogatories annexed herewith for the examination of Ramchandra, defendant No. 1, and Sham Kishan, defendant No. 2.

Or

The plaintiff prays that the interrogatories annexed herewith be delivered to Ramchandra, defendant No. 1,

Allahabad High Court are also of the same view (*Qabul Singh v. Jai Prakash*, 1939 All. 503); *Sri Nivas v. Lala Durga Prasad*, 1947 All. 125). For various methods of complying with Sec. 17 refer to (*Ram Bharose v. G nga Singh*, 1931 All. 727 (F. B.) ; 1946 All. 425, *Bipti v. Kali Din*, 1951 All. 156).

(j) The language of the rule (O. 11, R. 2) shows that a party should obtain permission from the court and should then himself deliver the interrogatories to the opposite party, and that the order of the court to answer interrogatories should be made only when the party interrogated neglects to answer the interrogatories or answers them insufficiently. But as direct service of notice is not in vogue in the Mufassil, the practice is to file interrogatories in court with an application and then to leave the court to serve them. The same is the practice in the case of

and Sham Kishan, defendant No. 2, respectively, for being answered within 10 days of the receipt thereof.

No. 22—Application for discovery of documents (k)

1. One of the questions at issue between the parties in this case is whether the plaintiff purchased the grain on his own account or on behalf of the defendant.

2. Another question at issue is whether the plaintiff paid any money to anybody on account of loss on the *Khatti* transactions on behalf of the defendant.

3. It is necessary for the fair disposal of the case and to save costs to have a discovery of documents relating to these matters.

The defendant prays that an order may be made directing the plaintiff to make discovery on oath of the documents which are, or have been in his possession or power, relating to the questions mentioned in paras. 1 and 2 of this application.

notices to admit facts and documents and to grant inspections. There is no express rule in the Code under which this assistance of the court to serve such interrogatories or notice is sought, but as parties have not sufficiently developed their sense of responsibility and fairness to each other, the courts help them, though they should encourage the parties to serve their notices etc. directly on the pleaders for the opposite parties. If a party is ordered to answer interrogatories he is not bound to answer personally in the absence of a specific direction to that effect and the affidavit may, therefore, be sworn by a recognized agent who knows the facts (*K. C. Majumdar v. Suraj Singh*, 193 I. C. 707, 1941 (Nag.) 205).

(k) This is a very useful process, full advantage of which is not taken in the Mufassil. A party can at once know the cards in the hands of his adversary and can then call upon him to grant inspection or to produce the documents if they are of help to him in advancing his own case or in damaging that of his adversary. The right is very wide and is not limited only to documents which will be relevant at the trial, (*Nathulal v. Shantilal*, 1961 M. P. L. J. Notes 237) and the other party is bound to disclose all documents in his affidavit (in *United Bank of India v. Neder Landasche Standard Bank*, 1962 Cal. 325, the Calcutta High Court insisted that no relevant document should be omitted from the affidavit of discovery and full description of each document must be given so that the order of production and inspection if made can be enforced), even though he may object to their production when required to produce them (*Gobinda v. Magneram*, 1940 (Cal.) 331, 190 I. C. 50). An application for discovery should precede an application for production (*Ghulam Mobinuddin v. State*, 1961 J. & K. 20).

**No. 23—Application for an order for inspection
(Under O. 11, R. 18 (1) (1))**

1. The plaintiff applicant gave a notice, through his pleader, to the defendant to produce for the applicant's inspection his *Rokar* and *Khata Babis* for 1978, 1979 and 1980 *Samvat*, and the notice was served on the defendant's pleader on October 20, 1924.

2. The defendant or his pleader has not sent any notice in reply fixing time and place for the inspection, though 10 days have expired since the service of the applicant's notice (or, the defendant has sent a notice to plaintiff refusing to grant the required inspection.)

3. The said inspection is necessary for the fair disposal of the case as the plaintiff cannot be prepared to meet the defendant's evidence at the trial without first getting a thorough acquaintance with the account-books on which the defendant will rely.

The plaintiff therefore prays for an order for the inspection of the said *babis*.

**No. 24—Application for an order for inspection
(Under O. 11, R. 18 (2))**

For the reason given in the annexed affidavit, the plaintiff prays for an order for inspection of the documents referred to in para. 1 of the said affidavit.

Affidavit

1. I make oath and say that the following documents are in possession of the defendant Raja Ram.

(1) The rules provide that an attempt to get inspection should at first be privately made by serving a notice under Rule 15 on the other party, and, if this fails, an application can then be made to the court. To such application, acknowledgment of service of notice on the opposite party and his reply, if any, should be annexed and the application had better be supported by an affidavit (*Dhapi v. Ram Prasad*, 14 C. 768). But this procedure is applicable to inspection of documents which are referred to in the pleadings or particulars or affidavits of the other party. If inspection is required of documents which are not so referred to no previous attempt to obtain private inspection is necessary, nor can such

Rokar Bahi for 1977.

Nakal Bahi for 1977.

Khata Bahi for 1977.

2. I make oath and say that I am informed by my vakil, Sri Ram Prasad, that I am legally entitled to inspect the said documents.

3. I make oath and say that the transactions in dispute are entered in the said documents, and that it is necessary for the saving of costs and for a fair disposal of the case that inspection of the same should be granted to me.

**No. 25—Application for summoning a record
(O. 13, R. 10) (m)**

For reasons mentioned in the annexed affidavit, the applicant prays that the following records be sent for and inspected :—

(1) Record of suit No. 198 of 1958 *Ram Chandra v. Mohd. Ali*, decided by the Civil Judge, Etawah, on December 20, 1958.

(2) * * * * * *

(3) * * * * * *

Affidavit

1. I make oath and say that I am the plaintiff in the above suit.

2. I make oath and say that production of the original record of suit No. 198 of 1958 mentioned in the accompanying application is material as it contains a promissory note

private inspection be demanded, but an application should be made directly to the court for an order for inspection. The applicant will have to show by an affidavit, to be annexed to such application, that these documents are in the possession of the other party, that the applicant is legally entitled to their inspection, and that the inspection is necessary for the fair disposal of the suit or for saving costs (O. 2, R. 18 (2)).

(m) The affidavit supporting the application should clearly specify (i) how the record is material, and (ii) that a certified copy cannot serve the purpose, or (iii) that copies cannot be obtained without unreasonable delay or expense. It is not sufficient merely to state that

and several written receipts by the defendant, and the said promissory note and receipts will be required for comparison of defendant's handwriting, and, as the said papers were filed by other persons, they cannot be returned to the plaintiff.

3. I make oath and say that the plaintiff has filed certified copies of plaint and written statement from record of suit No 124 of 1913 mentioned in the accompanying application and that the defendant has not admitted the said papers.

4. I make oath and say that the said papers referred to in para. 3 of this affidavit are relevant to the issue No 2 in this case, and the production of the original record is necessary to prove them

5. I make oath and say that the record of suit No 965 of 1921 contains a long account extending over 290 pages filed by the defendant's father, and that I want to tender the same as my evidence on issue No. 3 in this case.

6. I make oath and say that on my application for a copy of the said account mentioned in para. 5, I have been ordered to deposit Rs 125 as copying charges, and I have been informed by the Head Copyist that it will take at least 20 days to prepare the copy, and the copy cannot, therefore, be ready before November 14, 1926, the date fixed for trial of this case.

**No 26—Certificate of decree-holder under
(O. 21, R. 2) (n)**

I Ramlal holder of the decree in the suit described above, hereby certify that the whole of my said decree has been satisfied by the judgment-debtor—

the record is material or necessary for the ends of justice. The usual practice is to insist on production of certified copies of those papers the originals of which it is necessary to prove, before the originals are sent for. The original is sent for only if the other party does not admit the copy or there are any special reasons for production of the original.

(n) No court-fee is required on the certificate but the decree-holder should not make any prayer. It is not necessary that cash pay-

- (1) paying Rs. 200 to me in cash.
- (2) giving me a cow for Rs. 60.

No. 27—Application under O. 21, R. 2 (2)

1. The applicant is the judgment-debtor to decree No. 502 of 1921 passed by this court.

2. On January 4, 1922, the applicant paid to the decree-holder, out of court, a sum of Rs. 200 in part payment of the said decree.

The applicant prays that, after the usual notice to the decree-holder, the said payment be recorded.

ment should have been made but a decree can be adjusted by any lawful agreement between the parties (*Arunachalam Chettiar v. V. M. R. P. Firm*, 1938 Rang. 385, 1938 (Rang.) 202, 175 I. C. 498, 10 R. R. 500; *Satyabadi v. Mani Sahu*, 165 I. C. 940, 1936 (Pat.) 619; *Radha Krishna v. Mt. Bechni Devi*, 1940 (Pat.) 56). It is not necessary to specify the particulars of satisfaction, though the decree-holder may specify if he likes. When the decree-holder himself certifies adjustment the court need not go into the question but must record the satisfaction (*Champi Bai v. Pearey Lal*, 1937 A.L.J. 1305, 1938 (All.) 116, 174 I.C. 254, 10 R. A. 555), and any error on the part of the court in refusing or neglecting to record the adjustment cannot prejudice the rights of the parties (*Swaminath v. Samba* 174 I. C. 18, 1937 (Rang.) 507, 10 R. R. 383 (2)). But an adjustment under O. 21, R. 2 must be of an executable decree, and not, for instance, of a preliminary decree for sale, adjustment of which would fall within the purview of O. 23, R. 1 or 3, C. P. C.; (*Ram Nivas v. Ram Dayal*, 1938 A. L. J. 1231, 1939 (All.) 174, 1938 A. W. R. (H.C.) 859, 180 I. C. 244; *Raja Ram v. Allahabad Bank Ltd.*, 1939 (Lah.) 79). The application can be made to the court to which the decree has been transferred for execution (*Jagdish v. Saw Eo*, 1940 (Rang.) 236, 190 I. C. 680). There is no limitation for decree-holder to certify adjustment. Certification by a decree-holder is not an application and therefore it can be done at any time (*Raju Sri Prakash Singh v. The Allahabad Bank Ltd.*, 1929 (p.c.) 19; See also A.I.R. 1951 Pat. 593). Allahabad High Court has held that such a certificate cannot be filed by the decree-holder in execution proceedings after a controversy has arisen consequent on the judgment debtor's objection *Joti Prasad v. Sri Chand*, 1928 All. 629 and *Ram Prasad v. Jadunandan*, 1934 All. 534. But the period of limitation for an application by the judgment-debtor is 30 days from the time payment or adjustment is made, vide Art. 125 Indian Limitation Act, 1963.

**No. 28—Petition of claim under O. 21, R. 58
C. P. C. (o)**

Rup Ram S/o. etc.	..	..	Claimant
<i>versus</i>			
(1) Jhandumal S/o. etc.	..	..	(Decree-holder)
(2) Nathumal S/o. etc.	..	..	(Judgment-debtor)
			Opposite-parties

The above-named claimant begs to state as follows :—

1. The opposite party No. 1 has attached the following (among other) property in execution of his decree No. 128 of 1924, under execution in his court against opposite party No. 2.

2. The said property belongs to the claimant.

3. The said property has been attached from the claimant's possession for, it was, at the time of attachment, in possession of the opposite party No. 2 as hirer (or tenant of the same on behalf of the claimant.)

(o) The Judgment-debtor is not a necessary party to the objection, (See. *Contra* : *Thomman Mathai v. Ithendan Konjukochu*, 1963 Ker. 236) but if he is not impleaded the adjudication will not affect his rights. As a claim or objection under this rule can be summarily dismissed on the ground of delay, the cause of delay should be explained in the petition if it is filed with any appreciable delay. If the judgment-debtor claims the property in a capacity different from that in which a decree has been passed against him, he must come under Sec. 47 (*Shah Naim v. Girdhar Lal*, 100 I. C. 464, 4 O.W.N. 102; *Kuriyali v. Mayan*, 7 M. 255; *Nabi Bakhs v. Udho Ram*, 28 P.L.R. 121, 100 I. C. 786; *Chettior v. Teo*, 104 I. C. 121, 6 Bur. L. J. 107, 5 R. 393). Cal. H. C. has taken a contrary view in *Kartik v. Asutosh*, 39 C. 298, 12 I. C. 163, 14 C. L. J. 425, 16 C. W. N. 26, A. I. R. 1952 Ajmer 53. Even sale has been held not to be a bar to the adjudication of the claim under this rule provided it is not confirmed (*Mukkehi v. Allahabad*, 145 I. C. 142, 1933 (Sindh) 198; *Deoki v. Raghvindra*, 183, I. C. 371, 1939 (Pat.) 430; *Maung Po v. Maung Kwa*, 5 R. 751, 177 I.C. 761, 1938 (Rang). 80, *Chhoga Lal v. Khet Mal*, 1963 Raj. 144; *Mathura Pd. v. Ram Pd.* 1961 M. P. L. J. Notes 4; *Contra Ram Chandra v. Kayan Hussain*, 178 I. C. 410, 1938 (Nag.) 475; *Sashi Chandra v. Gopal Chandra*, 41 C. W. N. 845, 1937 (Cal.) 390; A. I. R. 1953 M. B. 264; *Janki Mohan v. S. Samad Das*, 1962 Pat. 403). An application by a simple mortgagee for having his charge notified is one under rule 58 (*Debi Das v. Rup Chand*, 102 I. C. 792, 25 A. L. J. 609; *Jagannadham v. Padayya*, 134 I.C. 809, 1931 M. W. N. 902, 1931 (Mad.) 782, 61 M. L. J. 884). In a claim under this Rule the claimant must allege and prove

The claimant prays that the said property be released from attachment.

No. 29—Application under O. 21, R. 89, C. P. C. (p)

1. The applicant is the judgment-debtor and owner of the property which has been sold by auction in the above execution case (or, the applicant is a mortgagee of the property sold in this case on behalf of the judgment-debtor).

that he had an interest in the attached property on the date of the attachment (*Smt. Saceda Begum v. Sabir Ali*, 1962 All. 9).

(p) An *interim* receiver of judgment-debtor's estate can also apply (*Ankayya v. Official Reciever, Kistna*, 171 I. C. 220, 1937 (Mad.) 589). Both the decree-holder and the purchaser should be impleaded as parties to this application though this is not absolutely necessary (*Jit Singh v. Daulatia*, 124 I. C. 32, 1930 (All.) 167). See next note. The application must show the right under which the applicant claims to be entitled to make the application under this rule. A lessee subject to whose lease property is sold can apply (*Bodapati v. Bodapati*, 51 M. 777, 1928 (Mad.) 1191, 109 I. C. 168). A purchaser after attachment can apply (*Jamna Das v. Jalaluddin*, 1936 (Lah.) 561), but not a purchaser after auction sale (*Raghunath v. Hari Ram*, 1940 (Sind) 181). Even a person with whom judgment-debtor has, pending attachment, made a contract of sale can apply (*Mundrika v. Nand Lal*, I. C. 689, 1941 (Pat.) 204). (1967) 1 Avdh. W. R. 288). When share of one member of a joint Hindu family is sold, others have a right to apply (*Ramachandra v. Srinivas*, 51 M. 246, 1928 (Mad.) 399, 109 I. C. 297). The money referred to in the rule should be deposited along with the application or, in any case, before the period of limitation (30 days from the sale), which cannot be extended by court (*Maung Lat v. Kyow*, 1933 (Rang.) 8; *Nasiriuddin v. Hakim Md.*, 161 I. C. 26, 1936 (Pat.) 119), but the Patna High Court has held that if the deposit was short owing to a miscalculation of office, the applicant should get another opportunity to make it good (*Gopinath v. Hiranman*, 1933 (Pat.) 515, 146 I. C. 971). When however the amount deposited was slightly different and the deficiency was caused by ministerial officer certifying that the amount tendered was correct and the applicant made it up as soon as objection was made, the court regarded the deposit as in order (*Rangini v. Hiralal*, 33 C. W. N. 1170; *Suresh v. Janendra*, 68 C. L. J. 273), but there can be no condonation if the shortage was due to applicant's own miscalculation (*Kalidasa v. Dodda Suddbra*, 1947 Mad. 165, 1946—2 M. L. J. 371). The Bombay High Court rejected their application when by a miscalculation of interest applicant's deposit was short by a few rupees (*Amritlal v. Sadashiva*, 1944 (Bom.) 233). The Calcutta High Court has allowed the deposit of 5% only in court when the decretal amount was said to have been satisfied out of court. In such cases, it has been further held that alleged satisfaction out of court can be challenged only by the decree-holder and not by the purchaser (*Mahendra v. Parasmani*,

2. The said sale took place on November 20, 1924.
3. The applicant begs to deposit.
 - (a) For the purchaser, opposite party No. 2—Rs. 105.
 - (b) For the decree-holder, opposite party No. 1—Rs. 3,090-5-4, the amount entered in the sale proclamation.

The applicant prays the said sale be set aside.

No. 30—Application under O. 21, R. 90, C. P. C. (q)

(On the ground of irregularity)

1. The applicant was, on the date of sale, owner of the property specified at the foot of this application and sold in the above execution case.
2. The property was worth Rs. 10,000 but it has been sold for Rs. 2,000.

1938 (Cal.) 252, 68 C. W. J. 264, 11 R. C. 232; *National Insurance Co. v. Ezekiel*, 41 C. W. N. 998). In a case where the decree itself had been set aside in appeal, the J. D. was permitted to apply for setting aside the sale on deposit of 5% only as no money remained due to the decree-holder (*Vithola v. Dhanaj*, 1948 (Nag.) 126).

The Allahabad and Calcutta High Courts have held that a formal application under this rule is not necessary and a *challan* or tender of the amount required is sufficient. (*Mahboob v. Majid*, 1939 (All.) 241; *Jyotish Chandra v. Surendra Nath*, 1939 Cal. 153). The Patna High Court insists on a formal and separate application (*Dhari v. Gauranga*, Pat. 210, 1940 (Pat.) 87). If part of the decree is satisfied out of court, it is sufficient to deposit the balance only (*Muthin Venkatapathad v. Kuppur*, 1940 (Mad.) 42, *Contra Ado Dass v. Bansi Das*, 1940 (Pat.) 612. But unless the decree has been satisfied out of Court or by deposit in court even decree holder's consent will not satisfy the requirement of the rule *Tribhuvan Das v. Rati Lal* A. I. R. 1968 S. C. 372 *Ramchandra Rao v. Maddi Kutumb Rao* A.I.R. 1967 S C. 1637. Notice to auction-purchaser is sufficient and he need not be made a party (*Vithola v. Mahadeo*, 1948 Nag. 303).

There should be a prayer for setting aside the sale, though omission of such prayer has been held not to invalidate the application (*Banarsidas v. Ramchandra*, 1933 (Lah.) 210,). A sale cannot be set aside in part under this rule (*Laxmansingh v. Laxminarayan*, 1948 (Nag.) 127).

(q) Both the decree-holder and the purchaser should be impleaded (*Ali Gauhar v. Bansidhar*, 15 A. 407; *Karamat Khan v. Mir Ali*, 11 A. W. N. 121), but even if either of them is not impleaded it is not a serious

3. The low bid was due to irregularities in publishing and conducting the sale.

Particulars of irregularities :—

- (i) The sale proclamation was not affixed to any conspicuous part of the property sold.
- (ii) The sale was not proclaimed by beat of drum on, or adjacent to, the property or at any other place.
- (iii) The amount of the encumbrance of Ramlal was Rs. 1,000 but it was wrongly mentioned in the proclamation as Rs. 4,000.
- (iv) The time fixed for sale in the proclamation was between 12 and 4 in the day but the Amin conducted the sale at 6 p. m.

Particulars of their consequences

1. As a result of irregularities Nos. (i) and (ii) Abdur Rahman, Ramadhar, Lotan Singh and other persons whose names are unknown to the applicant, who would have bid at the sale, did not receive any information of the sale.

defect as all that is required by law is a *notice* to both and not that they should be shown as parties to the application (*Kirpa v. Nandlal*, 107 I.C. 4943 *Ganesh Bob v. Vithal Vaman*, 37 B. 387, *Raj Chandra v. Kali*, 1923 (Cal.) 394, *Sain Das v. Punjab National Bank*, 1928 (Lah.) 418; *Dip Chand v. Sheo Prasad*, 27 A. L. J. 769, 1929 (All.) 593 Contra, *Ajuddin v. Khoda*, 50 I. C. 5 *Sumitra v. Damrilal*, 62 I. C. 61 (Pat.). But where an application was refused and an appeal was preferred without impleading the purchaser court refused to implead the purchaser after the expiry of the period for appeal and dismissed the appeal. (*Ramlal v. Kidar Nath*, 163 I. C. 698, 1936 (Lah.) 478). The applicant must show this right to apply. Any person whose interests are affected by the sale can apply, e. g., a judgment-debtor or an attaching creditor (*Raja Ram Raja Sahab v. Bhawani Shanker Joshi*, 1938 M. W. N. 1225, 1938 (2) M. L. J. 940). It is not necessary that he should be the owner of the property. Where a decree provided sale of item 1, and sale of item 2 only if proceeds of sale of item 1 proved insufficient, it was held that the owner of item 2 could apply (*Narayan v. Pappayi*, 103 I. C. 499 M.). The auction-purchaser himself can apply (*Subramaniam v. Chettyar*, 5 R. 516, 105 I. C. 465; *Sangitdas v. Chahadu*, 168 I.C. 970, 1937 (Nag.) 140; Contra, *Bal Krishna v. Sakbaram*, 164 I. C. 644, 1936 (Bom.) 311). A purchaser after sale cannot apply, but J. D. can still apply (*Fatima-ul-Hasna v. Baldeo*, 93 I. C. 24, 21 A. L. J. 69, 1926 (All.) 204, 48 A. 188; *Shankar Prasad v. Md. Taqi*, 1936 O. W. N. 344, 161 I. C. 424; *Kiranbala v. Suniti*, 179 I. C. 693, 1939 (Cal.) 146). A judgment-debtor can apply in spite of his having been adjudged insolvent (*Mantbiri v. Arunachala*, 1940 (Mad.) 569); but a monthly tenant cannot (*Brij Gopal Bhatia v. Union of India*, 1963 All. 445).

2. As a result of irregularity No. (iii) those who were present did not bid so high as they would have, had the amount of the encumbrance not been wrongly overstated.

3. As a result of the irregularity No. (iv), Ram Prasad, Maula Baksh, and Chatar Lal who had gone to the spot to purchase the property left the place at 4 p.m., and very few purchasers were present when the sale was held.

The applicant prays that the said sale be set aside.

No. 31—The like on ground of fraud

Paras. 1 and 2 as above.

3. The low bid was due to the fraud of the decree-holder.

Particulars of fraud

On the morning of the date fixed for sale (January 14, 1924) the decree-holder told Ramjilal, Ram Pratap, Chatar Singh and Lalmandas who were intending purchasers, that the sale had been postponed to another date, and this prevented them from going to the place of sale and bidding at

A third person who claims the property but does not prefer the claim under Rule 58 cannot apply under rule 90 (*Jagat Narayan v. Khator Singh*, 195 I. C. 173, 1941 (P. C.) 45; *Cherruppan v. Snankare*, 1941 (Mad.) 680). Persons entitled to rateable distribution under Sec. 73 can apply but not all creditors proving insolvency (*Official Receiver v. A. L. R. Veorappa*, 1943 (Mad.) 199).

A decree-holder attaching property after sale cannot apply (*Govinda-Sami in re*, 184 I. C. 166, 1939 (Mad.) 501). Inclusion of property not included in the decree is also a fraud in publishing sale and the remedy is by application and not by a suit (*Piare Lal v. Kishan Lal*, 110 I. C. 876, 1928 (All.) 704; *Baru v. Amir Singh*, 1939 A. L. J. 1015, 1939 A. W. R. (H. C.) 867, 1904 (All.) 78). A false representation which dissuaded bidders has been held to amount to fraud (*Jagdish v. Kunja*, 171 I. C. 822, 1937 (Cal.) 273).

The irregularity or fraud must be specifically alleged with particulars and a vague and general allegation will not be sufficient. The applicant must allege the injury he has suffered and must also allege a causal relation between the alleged irregularity or fraud and the alleged injury. This latter is absolutely necessary, as irregularity and injury alone are not sufficient unless it is shown that injury resulted from the irregularity (*Harindranath v. Bholanath*, 1937 A. W. R. 262, 170 I. C. 559, 1937 (All.) 407) mere irregularity and fraud in publishing or conducting the sale will not entitle the court to set it aside unless the applicant is proved to have sustained special injury by reason of such irregularity or fraud (*Sri Raja Bommadevma Najanna Naidu v. Sri Rajah B. V. Naidu*, 1945 (P. C.) 178). If a sale is intended to be set aside, not on the ground

the sale. The said statement was false and the decree-holder knew that it was false, and he made it fraudulently. The result was that only 4 persons attended the sale, and the decree-holder purchased the property at a low price.

No. 32—Application under O. 21, R. 91, C. P. C. (r)

1. The applicant was purchaser of the property specified at the foot of this application at an auction sale held by

of irregularity or fraud in publishing or conducting the sale but on ground of an illegality, e. g., a sale made after an order of postponement by the court of sale of ancestral property as non-ancestral or *vice versa* an application must be made under Sec. 47 and not under O. 21 R. 90. So also if the ground is fraud otherwise than in conducting or publishing (*Bhan Kumar v. Lachmi Kant*, 1941 (Pat.) 566. In such a case a suit for setting aside the sale may also lie (1966) 1 Audh. W. R. 11 *Bhagai v. Salimullah*).

Where an application has been made for setting aside a sale under O. 21, R. 90, C. P. C. and is pending it is not competent to the judgment-debtor to make or present another application under O. 21, R. 89, C. P. C. (*Gourdbandas Kanbayia Lal v. Ranchhoddas Bhikhari Lal*, 1949 (Bom. 271). Some High Courts have added additional provisos to the Rule, to which attention must be directed. Thus the Allahabad High Court has added a proviso having two clauses. One, to the effect that no ground can be raised under this rule which could have been raised before the proclamation was drawn up. The other is that the application shall not be entertained unless the applicant deposits such amount not exceeding 12½ % of the sum realised by the sale or furnishes such security as the court may in its discretion fix except where, for reasons to be recorded, it dispenses with the requirements of the clause. With reference to first clause it has been held by the Allahabad High Court that if a person had been impleaded after the sale proclamation had been drawn up and could not raise any objection at that time about any incorrect incumbrance shown in it, he could raise that point under R. 90 (*N. E. Engineering Co. v. Birma Devi*, 1961 A. L. J. 670 with reference to the second clause, it was held in *Kundan Lal v. Jagannath Sharma*, (1962 A.L.J. 574) that the word "entertained" did not mean "filed" and that the condition of the clause could be complied with before the application was heard and finally decided (See also *H. P. Bux v. H. S. & Sons*, 1963 A. L. J. 204). In *Dullo v. Devicharan*, (1962 A. L. J. 759) it was held that as it is for the court to fix the amount which is to be deposited or for which security is to be furnished the applicant has only to apply within time for fixing such an amount and cannot be allowed to suffer if the court does not fix the amount within time. In *D. C. Jain v. C. L. Gupta*, (1962 A.L.J. 7259), it was held that it is not the duty of the court to fix the amount but it can do so only when invited by an application. Similar provisions have been added by the Madras, Andhra Pradesh and Patna High Courts. Cases relating to those provisos may be seen with advantage.

(r) This application can be made only when the J. D. has no saleable interest at all. If he has some interest, though very small the sale

the Collector of Meerut on May 20, 1926 in execution of decree No. 256 of 1924 of this court.

2. The judgment-debtor Abdul Ali had by a sale-deed dated , sold the said property to his wife in lieu of dower debt and had therefore no saleable interest in it on the date of the said sale.

The applicant prays that the said sale be set aside.

No. 33—Application under O. 21, R. 97

1. The applicant is the decree-holder in the above-mentioned case (or, the applicant is an auction-purchaser of the house mentioned below in execution of the decree in the above case).

2. The applicant took out a warrant for delivery of possession of the said house.

3. On January 14, 1925, the Amin went to execute the said warrant, but the opposite party No. 1 (the judgment-debtor) and also opposite party No. 2, at the instigation of the opposite party No. 1 obstructed the said Amin in delivering, and the applicant in obtaining possession of the said house.

The applicant prays for an order under O. 21, R. 98, C. P. C. directing the applicant to be put in possession.

No. 34—Application under O. 21, R. 100

1. The applicant is owner of the house described below and was, on the date hereinafter mentioned, in possession of the same in his own account, (or, one Ramkishan is the owner of the house and the plaintiff was, on the date hereinafter mentioned, in possession of the same as a tenant on behalf of the said Ramkishan).

cannot be set aside, nor is a suit for compensation for loss of the property maintainable, but if a part of the property is lost, the auction-purchaser can sue the decree-holder for refund of the proportionate price within 3 years under Art. 62 or 97 (*Govinda Prasad v. Hasan Shah*, 166 I. C. 705, 1937 (Oudh) 286) (now Arts. 24 and 47). The purchaser will, on sale being set aside, be entitled to refund of his purchase money under Rule 94. The application should be made within 30 days of the sale

2. The opposite party obtained a decree No. 300 of 1920, from this court for delivery of possession of the said house, (or, the opposite party purchased the said house in execution of decree No. 300 of 1920 of this court).

3. The applicant was no party to the said decree.

4. On January 14, 1925, the opposite party, in execution of a warrant of delivery of possession obtained from this court, dispossessed the applicant.

The applicant prays that he may be put into possession of the said house.

No. 35—Application for substituting the heirs of a deceased plaintiff (O. 22, R. 3) (s)

1. Ram Prasad Plaintiff in this civil suit has died on January 13, 1930.

2. The said Ram Prasad's right to sue in this suit survives, and the applicants being his sons are his legal representatives.

The applicants pray that the court may be pleased to substitute the names of the applicants as plaintiffs in place of the deceased Ram Prasad and to proceed with the suit.

(Art. 127). It is important to note that this is the only remedy of the auction-purchaser. If he does not make an application under Rule 91 and the sale is confirmed he cannot sue the decree-holder for refund of the purchase money even if he is dispossessed by the real owner (*Idia v. Lachmi Narian*, 1936 A. W. R. 982, 1936 A. L. J. 1196; *Amal Chandra v. Ram Swarup*, 184 I. C. 453, 1939 (Cal.) 310; *Abinash Ch. v. Motilal Mukerji*, 1961 Cal. 172; *Tadavalli v. Maddi Patta* A. I. R. 1965 Audh. Pr. 239, Contra : *Thakurlal v. Nathulal*, 1964 Raj. 140).

-(s) Such application should be made within 90 days from the date of death (Art. 120), but if a plaintiff brings on record all the heirs then known to him and leaves out one of whom he had no knowledge, his application to implead the latter can be made within 3 years under Art. 181 (*Abdul Baki v. Bansilal*, 1945 (Nag.) 53 (now Art. 137). If the legal representatives of a deceased plaintiff or defendant are already on the record no formal application within the fixed period need be made but plaintiff may make a statement to the Court at any stage of the suit and get the fact noted on the record. (*Achuthan v. Manavikra-Man*, 51 M. 347, 109 I. C. 372, 54 M. L. J. 675); (*Punyabrata v. Monmolia*, 1934 (Pat.) 427; *Sankru v. Bhoju*, 165 I. C. 612, 1936 (Pat.) 548) Contra, (*Santoolal v. Champalal*, 150 I. C. 915, 1934 (Nag.) 165; *Bhudeb v. Bhikshanker*, 196 I. C. 837; *Khodadad v. Bai Jerbai*, 39 Bom. L.R. 1156). An Application

No. 36—Application for substituting the heirs of a deceased defendant (O. 22, R. 4)

1. Allauddin one of the defendants in this civil suit has died on June 3, 1930.

2. The right to sue in this suit does not survive against the surviving defendants.

3. The names and addresses of the legal representatives of the said Allauddin are given below :—

The applicants pray that the court may be pleased to substitute the persons mentioned in para. 3 above as defendants in place of Allauddin deceased and may proceed with the suit.

No. 37—Application to set aside an abatement of suit by reason of defendant's death (O. 22, R. 9) (t)

1. Khuda Baksh, defendant in the above case died on January 16, 1924, and no heirs of the said Khuda Baksh having been brought on the record within the period prescribed by law, the suit abated on April 16, 1924.

2. The applicant was prevented by the sufficient cause disclosed in the annexed affidavit from continuing the suit.

The applicant prays that the said abatement be set aside and the name of Maula Baksh be substituted for that of Khuda Baksh as defendant.

Affidavit

1. I make oath and say that I did not know of the death of Khuda Baksh defendant in this case until January 14, 1925.

is necessary for bringing legal representative as record (*Union of India v. Ram Charan* A. I. R. 1964 S. C. 215). In the absence of fraud or collusion same heirs of a deceased appellant applying to be brought on record can represent the estate (*Dobai Mabico v. Krishna Chandra Patnaik* A. I. R. 1967 S. C. 49). But if appeal abates against one appellant court cannot pass decree in favour of all under O. 41 R. 4 C. P. C. nor in favour of remaining appellants if it results in two inconsistent decrees (*Sri Chand v. M/s Jadish Pal Krishan Chand* A. I. R. 1966 S.C. 1427).

(t) Bonafide ignorance of death is sufficient cause for setting aside an abatement. But mere allegation of belated knowledge is not sufficient. Reasons for late knowledge must be stated (*Union of India v. Ram-*

2. I make oath and say that I learnt of the death of the said Khuda Baksh for the first time on January 14, 1925.

3. I make oath and say that Maula Baksh is the son and the only heir of the said Khuda Baksh.

No. 38—Application to set aside abatement of suit by reason of plaintiff's death (O. 22, R. 9)

1. Ram Lal, plaintiff in the above case and the deceased husband of the applicant, died on October 16, 1925, and no heirs having been brought on the record within the period prescribed by law, the suit abated on January 16, 1925.

2. The applicant was prevented by the sufficient cause disclosed in the annexed affidavit from continuing the suit.

The applicant prays that the said abatement of the suit be set aside and the name of the applicant be substituted for that of Ramlal as plaintiff.

Affidavit

1. I make oath and say that I am the widow of Ramlal, plaintiff in the above mentioned case.

2. I make oath and say that before the date mentioned in para. 2 of the affidavit I was not aware of the above mentioned suit.

charan A. I. R. 1964 S. C. 215). The suit abates automatically on expiry of the period fixed for substitution of heirs (*Ala Bhai v. Bhure* 1937 (Bom.) 401). Formal order of abatement is not necessary (*Chunnial v. Amorichand* 1933 (Lah.) 356). An application to have the abatement set aside must be made within 60 days of the abatement, *i.e.*, from the date on which the abatement takes place under the law, and not from the date on which the order of abatement is recorded by the Court (*Churya v. Rameshwar*, 24 A. L. J. 360; *Fazal Rahim v. Hussaina*, 1939 (Lah.) 572). If a party to a decree under O. 34 R. 4, C. P. C. dies before passing of the final decree O. 22, R. 3 or 4 does not apply as there is no suit which can abate; the suit having culminated in a decree, and application for substitution of legal representatives in such cases can be made under O. 22, R. 10 (*Eknath v. Hanmant Ram*, 1947 Nag. 75; *Daworali v. Boi Jodi*, 1940 Bom. 318, 192 I.C. 405; *Nazir Ahmad v. T Taniyaddi*, 1929 Cal. 430, 57 C. 285; *Mt. Lakhpatt v. Daulat Singh*, 1927 Oudh 156, 2 Luck. 464; *Mt. Bholia v. Alidas Shakur*, 1931 Pat. 57; *Perumal Pillay v. Perumal Chetty*, 1928 Mad. 914; *Allauddin v. Biran*, 1949 Pat. 259). A contrary view was taken in Allahabad but that H. C.

3. I make oath and say that, on March 14, 1925 my brother Indra Narayan, who manages my property, found papers of the said case amongst the papers of the said Ram-lal.

4. I make oath and say that, on the same 14th day of March, 1925, the said Indra Narayan told me of the said case and then for the first time I came to learn of the said case.

No. 39—Application under O. 23, R. 1, for withdrawal of a case with liberty to bring a fresh suit

1. There is a plea of misjoinder of defendants and causes of action in this suit and the suit must fail by reason of this formal defect.

2. The plaintiff prays that permission be granted to him to withdraw the claim in respect of house No. 1 against defendant No. 2, with liberty to bring a fresh suit in respect of the said house against the said defendant No. 2.

No. 40—Application for having a decree passed in accordance with an alleged compromise not admitted by the other party (O. 23, R. 3.) (u)

1. After the institution of this suit, on April 14, 1925 the claim was adjusted wholly by a compromise between the parties.

has since amended O. 22, R. 12 and by that amendment it has been ruled O. 22, Rr. 3 and 4 do not apply to cases of death after passing of preliminary decree.

Suit can be allowed to be withdrawn even if plaintiff has entered upon evidence *Harbans Rai v. Firm K. B. Das* A. I. R. 1968 S. C. 111.

(u) If the compromise is proved, the court is bound to record it, no matter that the other party has not signed the compromise or wishes subsequently to resile from it (*Sri Krishna v. Jamna*, 1938 O. W. N. 348, 173 I. C. 980, 1938 (Oudh) 103, 10 R. O. 248). Before reading a compromise the Court is not only entitled but bound to examine it and determine whether it embodies a lawful agreement or compromise (*Sayed Abdul Ali v. Mirza Viqar Ali Beg*, 1947 O. W. N. 595, 23 Luck. 77).

The word "lawful" in Order 23, Rule 3 means agreements which in their terms are not unlawful (*Puttural v. Dhiraj Sumer*, 1963 Raj. 63) and includes agreements which are voidable at the option of one party. If the Court is satisfied that the agreement was in fact made, it must record it. It is not open to the court to enter into an enquiry as to whether it was brought about by fraud, misrepresentation, coercion or undue

2. The following were the terms of the said compromise : (i) That the plaintiff should withdraw his suit about house No. 1, and the claim about house No. 2 be decreed, (ii) that the defendant should pay Rs. 200 on account of damages to the plaintiff within three months but if the defendant failed to pay the said amount within the said time, the plaintiff should get a decree for the whole amount claimed, viz., Rs. 3,000, and (iii) that the parties should bear their own costs.

3. The plaintiff now refuses to file the said compromise in court.

The defendant prays that the said compromise be recorded and a decree be passed in accordance therewith.

**No. 41—Application for security for costs
(O. 25, R. 1) (v)**

For the reasons disclosed in the annexed affidavit, the applicant prays that the plaintiff be ordered to furnish security for the payment of all costs incurred, and likely to be incurred, in the defence of this suit by the applicant.

Affidavit

1. I make oath and say that the plaintiff is resident of Pakistan.

influence. *Union of India v. Ragbbir Saran*, 1957, All. 120; *Quadre Jaban Begum v. Fazal Ahmad*, 1928 All. 494; *Hasan Yar Beg v. Radha Kishan*, 1935 All. 137; *Suraparaju v. Venkataratum*, 1936 Mad. 347; *Kuppu Swami v. Pavarnambal*, 1950 Mad. 728; *Western Electric Co. v. Kailash Chand*, 1940 Bom. 60; *Harbans Singh v. Bawa Singh*, 1952 Cal. 73; *Ram Asrey v. Remeshwar Prasad*, 1961 All. 529.

If any party denies having entered into the agreement, the Court must enter into this question and give its finding. *Mst. Kalpa v. Sita Ram*, 1955 All. 187. The Court has no power, except when a party is a minor, to inquire into the fairness or unfairness of the terms; (*Suraparaju v. Venkatarathnam*, 161 I.C. 728, 1936 (Mad.) 347, 1936 M.W.N. 199).

(v) Security for costs can be demanded (1) when the plaintiff or plaintiffs reside out of India, and have no sufficient property in India other than the one in dispute. A party who leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India for this purpose. According to Allahabad

2. I make oath and say that the plaintiff has no property in India, except some furniture in the house which he has rented for his temporary residence at Agra.

3. I make oath and say that the said furniture is worth about Rs. 200, while the costs already incurred by the defendant amounts to Rs. 470.

4. I make oath and say that the plaintiff's claim is frivolous and is without any merits.

5. I make oath and say that the suit has been filed at the instigation of Chandra Kishore and Lachmichand of Agra, simply to harass the defendant. The said persons are financing the plaintiff.

No. 42—Application for appointment of a guardian ad litem of a minor defendant (O. 32, R. 3) (w)

For the reasons disclosed in the annexed affidavit, the plaintiff prays that Ram Prasad, son of Ramlal, Brahman of Jubbulpur, or some other fit and proper person, be appointed as the guardian *ad litem* of Kishan Lal minor defendant in this case.

Affidavit to accompany the above application

1. I make oath and say that Kishan Lal defendant is a minor.

amendment security can also be demanded from the plaintiff when he is being financed by a person not a party to the suit. Security cannot be demanded in all such cases but can be demanded only in exceptional cases, *e.g.*, when the real plaintiff is some one else and he has brought the suit in the name of person who has no means, or when it is shown that such order is essential for the protection of the defendant; (*Cellular Clothing Co. v. Sen Abdool & Co.*, I. L. R. (1938) 1 Cal. 688, 42 C. W. N. 270). The court is entitled to look into the *prima facie* merits of the case before passing such an order, and no order will be passed if the plaintiff has a good *prima facie* case and the defendant has apparently no defence. If the suit appears to be frivolous and not to have been filed in a *bona fide* spirit, *e.g.*, when it is filed with the sole object of delaying another suit or execution proceeding, an order for security will be passed if the other conditions of the rule are fulfilled.

(w) A court is bound to appoint a guardian for minor defendant and the absence of such appointment nullifies the decree (*Baraik Ram v. Chowra*, 1938 (Pat.) 97, 173 I. C. 644, 19 P. L. T. 259; *Tajuddin v. Khambatta*, 1938 (Lah.) 515, 40 P. L. R. 857; *Talib Ali Shah v. Piarey*

2. I make oath and say that the said Kishanlal has no guardian appointed or declared by any authority.

3. I make oath and say that the father of the said Kishanlal is the mortgagor under the mortgage which is the basis of this suit and is himself a defendant as such mortgagor, and his interest is the matter of controversy in this suit is therefore adverse to that of the said Kishanlal.

4. I make oath and say that the said Kishanlal has no other natural guardian.

5. I make oath and say that the said Kishanlal lives in the care of his father.

6. I make oath and say that Bishanlal is the elder brother of the said Kishanlal and is a fit person to be appointed as the guardian of the said Kishanlal.

7. I make oath and say that the said Bishanlal has no interest in the controversy in this suit adverse to that of the said Kishanlal.

No. 43—Application to sue as a pauper O. 33

R. 2 C.P.C. (x)

Draw up the plaint in the usual form, and add the following as the last paragraph before prayer for relief :—

Lal, 1930, A. L. J. 938), and an application by the plaintiff is not absolutely necessary, though one is usually made; and becomes necessary so as to inform the court about the proper person to be appointed as a guardian. An affidavit should be filed with such an application in which the following points should be stated:—

(1) That the defendant is a minor and (within the State of U. P.) his age, as that is required to determine whether the notice, which is required only if he is over 10, should or should not be issued to him;

(2) The name and address of any person appointed or declared by any authority to be the guardian of the minor;

(3) If there is no such person, a statement to that effect, and the names of natural guardians;

(4) If there is no natural guardian, a statement to that effect, and the name of the person with whom the minor actually lives;

(5) That the proposed guardian is a fit and proper person to act as guardian;

(6) That he has no interest in the matter in controversy in the suit adverse to that of the minor.

(x) A list of movable and immovable property owned by the applicant with estimated value should be annexed to the plaint. If it is not annexed but the inventory is given in the plaint itself, it has been

“The plaintiff is not possessed of means sufficient to enable him to pay the court-fee prescribed by law for this suit, and therefore prays for permission to sue as a pauper. The immovable and movable property owned and possessed by the applicant is specified in schedules A and B respectively at the foot of the plaint.”

No. 44—Application for a final decree for foreclosure (y)

1. A preliminary decree for foreclosure in terms of O. 34, R. 2, C. P. C. was passed by this court in the above case on January 14, 1920.

2. The said decree declared Rs. 5, 200 to be the amount due to the plaintiff on July 14, 1920, the date fixed for payment.

held to be sufficient compliance (*Lachmi Narain v. Bahadur Lal* 1942 (Oudh) 239). There is no separate application as in appeal, but the plaint itself is the application. A company or its liquidator cannot sue as a pauper (*B. A. C. Mills v. Kameshwar Singh*, 42 C. W. N. 1164, 1938 (Cal.) 745). The Allahabad and Kerala High Courts, however, have taken a different view (*Kundan Sugar Mills v. India Sugar Syndicate*, 1959 (All.) 540 F. B.; *Mathew v. Kerala United Corporation Ltd.*; 1961 Ker. 180. On rejection of the application, the plaintiff may pay the court-fee and the suit will be deemed to have been instituted on the date the application for permission to sue as pauper was made, *Bhushan v. Kanai Lal*, 41 C. W. N. 537, 170 I. C. 758, 1937 (Cal.) 241; *Lalta v. Avadh N. Singh*, 184 I. C. 443, 1939 A. W. R. (c. c.) 222, 1939 O. W. N. 920, 1940 (Oudh) 59, but it has been held in Nagpur that if the plaintiff had not acted in good faith and had filed the application simply to gain time to arrange for court-fee, the advantage of Sec. 149 cannot be allowed to him (*Seth Ghasi Ram v. Mt. Acharaj Kuar*, 166 I. C. 796, 1937 (Nag.) 36). Allahabad has held that during the pendency of the pauper application or at the time of its rejection court can grant time to pay court-fee. If no such order is passed, pauper application is, on rejection, completely disposed of and court-fee cannot be paid so as to turn that application into a suit. Court cannot grant time after rejecting the application. *Devendra Kumar v. Raghuraj Bharti*, 1955 All. 154.

If during the pendency of the application the pauper dies, his legal representatives may either pay the court-fee or continue the application by proving that they themselves are paupers. *Mst. Latifunnissa v. Mst. Khairunnissa*, 1955 All. 53.

(y) The practice is to give a fresh list of mortgaged property, but it is not necessary to give it (*Chandra Shekhar v. Amir Begum*, 49 A. 592), nor can such an application be rejected for wrong calculation of interest (*ibid*). Under the amendment made by Act XXI of 1929 now

3. The defendants have not paid the said amount or any part thereof.

The plaintiff prays for a final decree directing that the defendants be debarred from all rights to redeem the mortgaged property, and ordering the defendant to put the plaintiff in possession of the said property, and for costs of this application.

No. 45—Application for a final decree for sale (z)

1. A preliminary decree for sale in terms of O. 34, R. 4, C. P. C. was passed in the above case on December 15, 1920.

2. The said decree declared Rs. 2,300 as the amount payable to the plaintiff on June 15, 1921, the date fixed for payment.

3. The defendant has not paid the said sum or any part thereof.

4. Rs. 2,486 is now due to the plaintiff.

	Rs.
<i>Particulars</i> : Amount entered in the preliminary decree	2,300
Interest from June 15, 1921 up-to-date	186

The plaintiff prays for a final decree for sale of the property in terms of O. 34, R. 5. (2) for Rs. 2,486, with further interest from the date of this application to the date of realization, and costs of this application.

even the defendant has to make an application without which final decree cannot be passed in his favour if he pays the decree. Final decree is passed on the basis of preliminary decree and court cannot go behind the latter. For example, if a defendant dies and his sons are added, the latter cannot challenge the preliminary decree on the ground that the mortgage was without legal necessity (*Ram Ugrab v. Ganesh Singh*, 1940 (All.) 99).

(z) It has been held in the M. P. that a written application is not necessary but court may pass a final decree on the oral application of the decree-holder (*Sitaram v. Lakshman Rao*, 1926 (Nag.) 152). Adjustment or payment after preliminary decree can be pleaded by defendant even though not certified (*Madan Theatres v. Din Shah*, 1945 (P. C.) 152.)

No. 46—Application under O. 34, R. 6, C. P. C. (aa)

1. In execution of the decree for sale under O. 21, R. 8, C. P. C. in the above case the whole of the property directed to be sold has been sold.

2. The net proceeds of the sale of such property have been found insufficient to pay the amount due to the applicant and Rs. , is still due to him as per account given below.

3. The suit on which the decree for sale was obtained was instituted by the applicant on September 20, 1925 on foot of a mortgage decree of May 15, 1920.

4. Of the two executants of the said mortgage-deed, Ram Prasad is dead, and opposite party Nos. 2-4 are his sons.

The applicant prays that a decree for Rs. be passed against opposite-party No. 1 and the assets of Ram Prasad deceased in the hands of opposite party Nos. 2-4.

(aa) This application can be made only if the suit had been brought within limitation for a personal decree, but a personal decree for costs can always be made (*Dost Md. v. Miraj Din*, 163 I. C. 100, 1936 (Lah.) 387). The whole of the mortgaged property must be exhausted before applying for a personal decree, but if the property is not available for sale, a personal decree can be applied for (*Makhan Sahu v. Kumarunnissa Bibi*, 1938 P. W. N. 423, 1938 (Pat.) 525, 17 Pat. 538; *Ganeshwar v. Harish*, 1940 (Pat.) 616), but not if the part of the property is not available by reason of the decreeholder's own act of releasing it in favour of one of the heirs of the mortgagor (*Ulfat Husain v. Girdhari Lal*, 166 I. C. 673, 1937 (Oudh) 252). An application under the rule will lie even when defendant's sons have got the mortgage decree and consequent sale set aside and purchase money has been returned to the auction purchaser (*Badal Singh v. Debi Saran*, 49 A. 506). The question whether the plaintiff should get a decree under O. 34, R. 6 is to be considered when such an application is made and not during the pendency of the original suit as the preliminary decree only reserves to the plaintiff a right to make an application for a personal decree. The Chief Court of Oudh has taken a view, which means hardship to many defendants, that the direction of the court in the mortgage decree that in case the mortgaged property was not sufficient, plaintiff should be at liberty to apply for a personal decree amounts to an adjudication that the plaintiff is entitled to such a decree and the defendant cannot contest the application by pleading that personal decree was barred at the time of suit (*Ramnath v. Nageshwar*, 1930 (Oudh) 378), because this prayer is seldom contested by defendants in the original suit. In fact, even if there is no such reservation in the preliminary decree in the

No. 47—Application for a final decree for redemption by the plaintiff

1. A preliminary decree for redemption was passed by this court in the above case on January 14, 1901, directing the plaintiff to pay Rs. 2, 345 on or before July 14, 1921.

2. The plaintiff has paid into court the said sum on July 10, 1901.

The plaintiff prays that a decree be passed ordering the defendant to put the plaintiff in possession of the mortgaged property.

No. 48—Application by defendant for decree under O. 34, R. 8, C. P. C.

1. (as in the last precedent.)

2. The plaintiff has not paid the said amount or any part thereof.

The defendant prays that a decree for sale of the mortgaged property for the realization of the said amount and costs of the application be passed in terms of O. 34, R. 8 (or, that a decree be passed that the plaintiff and all persons claiming through him be debarred from all rights to redeem the mortgaged property and ordering the plaintiff to put the defendant in possession of the mortgaged property and to pay the costs of this application).

No. 49—Application for arrest before judgment (bb)

1. The facts disclosed in the annexed affidavit afford a reasonable probability that the plaintiff will, or may be

original suit, that will not bar the plaintiff's right to apply after the sale of the mortgaged property (*Gopalswami v. D. Narayanaswami*, 1944 Mad. 65, 211 I. C. 630). But if a claim for personal decree is made and rejected on merits a subsequent application for it will not lie (*Md. Huzabar v. Abdul F. Khan*, 1936 A.L.J. 1228, 1936 A.W.R. 1033. Limitation is governed by Art. 137 and time runs from the date of final confirmation of sale of mortgaged property (*Jagrup v. Ram Gati*, 168 I. C. 673, 1937 (All.) 285).

(bb) Arrest before judgment cannot be granted except on a very strong case being made out by the plaintiff. The case should fall under O. 38, R. 1, C. P. C. An intention to delay the plaintiff or to avoid

delayed in the execution of any decree that may be passed against the defendant in this case.

2. The plaintiff prays that a warrant be issued for the arrest of the defendant, and on the defendant being brought to court, such order about deposit of money or security or imprisonment of the defendant in the civil prison may be passed as may appear to the court to be just and sufficient to safeguard the plaintiff's interest in the suit and under the decree that may be passed.

Affidavit

1. I make oath and say that the defendant was served with summons in the above case on July 10, 1959.

2. I make oath and say that, on the night of the same day, July 10, 1959, the defendant sent all his household effects, jewellery and cash, with his family, to Rampur.

3. I make oath and say that I am informed by Babu Lal, Head clerk of Messrs. Green & Co. in whose office the defendant is employed, and I verily believe it to be true, that the defendant has given a notice to his said employers to leave their service at the end of the month of July, 1959.

4. I make oath and say that I am informed by Bodhu son of Jhamu, Brahman, employed as the defendant's cook, that the defendant is intending to leave British India and to go to Rampur at the end of this month

any process or to obstruct or delay the execution of the decree is essential in a case under Clause (a) and a reasonable probability that the plaintiff will or may be obstructed in the execution of his decree is a necessary element of a case under Clause (b). Such intention or probability must be clearly shown by facts and, unless this is shown, no application for arrest can be granted.

It is not necessary that an application for arrest should be supported by an affidavit, if there are other materials on the record from which the applicant can make out a case. But as generally there are no such materials on the record, the practice is, and it is a very good practice, that an affidavit accompanies such an application.

No. 50—Application for attachment before judgment (cc)

1. For reasons disclosed in the annexed affidavit, the plaintiff prays that the defendant be ordered to furnish such security as the court thinks proper and, on his failure to do so, following property be attached.

2. As there is a danger that the said property may be soon disposed of by the defendant, the plaintiff further prays that, pending final orders of the court, the said property may be conditionally attached.

Value

* * * * *

Affidavit

1. I make oath and say that the summons in this case was served on the defendant on June 10, 1925.

2. I make oath and say that the defendant has no other property except that specified below :—

Property

* * * * *

3. I make oath and say that the defendant has, after the receipt of summons, made negotiations with Ramlal of Karori village, for the sale of the said property.

4. I make oath and say that I am informed by Santlal patwari of village Karori, and I verily believe it to be true, that Ramlal has paid Rs. 100 as earnest money to the defendant and the latter has agreed to execute a sale-deed in favour of the said Ramlal in the course of a week.

(cc) This is also granted only on very strong grounds and an intention to delay or obstruct the execution of any decree that may be passed must be established before an attachment order can be obtained. The bare fact that the defendant has transferred a portion of his property or is about to transfer some property is no ground, for that may have been done to pay off his other debts or to meet his immediate or necessary expenses. Unless the motive of a proposal to transfer his property is shown to be to delay or obstruct the plaintiff's decree, no

5. I make oath and say that I am informed by the said Santlal, and I verily believe it to be true, that the defendant had told the said Santlal to have the sale-deed executed without unnecessary delay and that on being asked the cause of the haste, the said defendant told the said Ramlal that the plaintiff had instituted a suit against him and that he apprehended that the whole property would be swallowed up by the decree of the plaintiff.

No. 51—Application for a temporary injunction (dd)

For reasons disclosed in the annexed affidavit, the plaintiff prays that the defendant No. 1 be restrained by a temporary injunction from selling the property specified below

order for attachment can be passed. The remarks about the necessity of an affidavit made in the last note apply here also.

(dd) Order 39, rules 1 and 2 lay down the cases in which a temporary injunction can be granted. It does not, however, follow that an injunction will, as a matter of course, be granted in all cases, but it must be understood that the grant of an injunction being always discretionary, it cannot be granted unless it is shown that a substantial, serious, immediate and almost irreparable injury will result if it is not granted. In no case will an injunction be granted to prevent a breach of contract, unless the contract is one which can be specifically enforced or the case is one for a perpetual injunction. But it does not follow that in all cases in which specific performance or injunction can be granted by the decree, a temporary injunction always be granted, for, to justify an injunction not only must the case be one in which an injunction is an appropriate relief, but there must be the further ingredient that unless the defendant is restrained forthwith by a temporary injunction, irreparable injury or inconvenience may result to the plaintiff. Mere inconvenience cannot be said to be irreparable injury (*Secretary, Civil Stn. Sub-Committee, Nagpur v. Govindrao*, 170 I. C. 239, 1937 (Nag.) 137). In a suit for declaration of title merely and neither for possession nor for perpetual injunction, a temporary injunction restraining defendant from interfering with plaintiff's possession will not be granted (*Sachindera v. Panchanan*, 94 I. C. 871, 30 C. W. N. 214, 1926 (Cal.) 604). An agreement which is often advanced in support of an application for injunction is that the injunction will cause no harm to the defendant. That is no consideration and can be no ground for the grant of an injunction (*Gopalji Jha v. Gajendra*, 162 I.C. 210, 1936 (Pat.) 226). The applicant must, therefore, make out from his application or affidavit, not only a case within the scope of rule 1 or 2 but also a strong case of some substantial and irreparable injury to him. For instance, if the defendant commences to build on the plaintiff's land, there is no case for an injunction to restrain the defendant from building, because, if the plaintiff succeeds, the defendant's building

in execution of his decree No. 140 of 1922 passed by the Subordinate Judge, First Class, of Ahmedabad.

List of property

* * * * *

Affidavit

1. I make oath and say that I am the owner of the property which is put up to sale in execution of decree No. 140 of 1922 passed by the Subordinate Judge, First Class, of Ahmedabad, and that Anand Chand, judgment-debtor, has no right or interest in the said property.

2. I make oath and say that November 14, 1925 is the date fixed for sale.

3. I make oath and say that the property consists of my favourite furniture and some are pictures.

4. I make oath and say that no amount of money can compensate me for the loss of the said property.

will be demolished. But if a defendant commences to demolish the plaintiff's house, he may be restrained by an injunction from doing so. An injunction will never, unless in very exceptional cases which must be rare, be granted to restrain a public functionary from doing his duties. A pleader should refuse to apply for a temporary injunction unless there are very substantial grounds for the application. It is also his duty to warn the client of the provisions of Sec. 95, C. P. C. before making an application which does not appear to him to be fully justified.

It is the practice at some places to apply for an injunction where attachment before judgment is the more appropriate relief because it is considered that an injunction is more readily granted on the ground that it causes no hardship to the defendant, but this impression must be removed, as under the law, injunction is not an easier process than attachment before judgment.

Apart from O. 40, the court has inherent power to pass an order for providing for protection and security of the suit property. Therefore the court can, under this power, issue an injunction before the question of pauperism is decided and the suit is registered (*Ram Khelawan v. Sudama Devi* A.I. R. 1964 All. 366; *Matuki Mistry v. Kamakshaya Pd.*, 1958 Pat. 264.) Court has also inherent power to stop abuse of process e.g., to issue injunction to restrain defendant from prosecuting a suit instituted in a court different from that agreed in the contract (*Firm Bichharam v. Firm Baldeo Sahai*, 1940 (All. 241)).

No. 52—Application for appointment of a receiver in a suit for possession (ee)

For reason disclosed in the annexed affidavit the plaintiff prays that a receiver of the property specified below be appointed, that the defendant be removed from possession of the said property, and that the same be committed to the charge of the receiver, to be managed by him under the directions of the court until the final disposal of the case, or until further orders and that such further and other orders be made as the court thinks just and proper.

Details of property

* * * * *

Affidavit

1. I make oath and say that one Sant Lal was the owner of the property in dispute in the above noted case.

2. I make oath and say that the said Sant Lal executed a will on July 24, 1920, bequeathing the said property to me and deposited the said will in the office of the District Registrar of Agra.

(ee) See O. 40, R. 1. This is also an order which can be passed only in very exceptional cases. If the defendant is in possession of property claimed by the plaintiff, he cannot be dispossessed unless it is shown that the plaintiff has a *prima facie* title as against the defendant, that the defendant is mismanaging the property, and that there is a danger that the value of the property will be reduced by the time the suit is decided. (*Bidurramji v. Kehoramji*, 1938 A. W. R. (c. c.) 127. 1938 (O. W. N.) 1153, 178 I. C. 725). Specific acts of mismanagement should be alleged, and established *prima facie* (*Manavedan v. Manavedan*, 164 I. C. 857, 1936 (Mad.) 817). Mere existence of an apprehension in the mind of the plaintiff is not sufficient (*Hari Kishan Lal v. Peoples Bank of Northern India*, 1936 (Lah.) 102). Mere poverty of the defendant is no ground for dispossessing him of the property of which he has been in long possession (*Shivaji v. Aishwaryanandji*, 29 M. L. T. 209, 29 I. C. 485), but if disputes arise between the parties immediately on the death of the owner, and something can be said in support of the claim of each party, it is a good case for appointment of a receiver. The criterion is whether the appointment is convenient *as well as* just. The main object should be the preservation of the property, but no order should be made if injustice would be caused to the other party (*Har Gopal v. Deomiti*, 1945 (Pat.) 404). Receiver can be appointed in case of a suit on a simple mortgage, either before or after the preliminary decree ((*Damodar v. Radhabai*, 40 Bom. L. R.

3. I make oath and say that the said Sant Lal died in November, 1921.

4. I make oath and say that I was in England from September, 1921 to September, 1924, studying for the bar.

5. I make oath and say that on the death of the said Sant Lal the defendant obtained possession of the said property on the ground of his being a distant kinsman of Sant Lal.

6. I make oath and say that since he has obtained possession the defendant is mismanaging the property and reducing the value of the *corpus* of the said property.

7. I make oath and say that I have learnt from the copies of the *pattas* and of village papers, and I verily believe that the information contained in them is true, that the defendant, in July, 1922, granted 20 years' *pattas* to the following tenants at half the generally prevalent rents :—Achbal, Badam, Hukmi, Sattar, Subhan.

8. I make oath and say that I have been informed by the village patwari Lala Ram and I verily believe the information to be true, that the defendant has taken large sums of money as *nazrana* from the following tenants and has withdrawn the suits for ejectment filed against them and has allowed them to acquire occupancy right :—Ramnarayan, Shama, Abdulla and Godha.

9. I make oath and say that I have been informed by Chaudhri Lalsingh, Mukhia of the village Rekra, and I verily believe it to be true, that the defendant has cut down trees worth Rs. 6,000 in the said village Rekra.

10. I make oath and say that I have been informed by my pleaders, and I verily believe it to be true that it will take about two years to dispose of this case in this court and an other three years to dispose of the appeal in the High Court.

1266; *B. Banerji v. Sir S. S. Singh Deo*, 1947 A. L. J. 10; *Onkarlal Radha-Kishan v. V. S. Rampal*, 1961 Raj. 179; *J. Kishanlal v. A. Rathan Singh*, 1954 Mys. 162; *Muniammal v. Pagadala Gurwayya Naidu*, 1960 Mad. 195). But it has been held in some cases that receiver should not be appointed

No. 53—Ditto. In a suit for partition

(Alternative form, in which allegations are made in detail in the petition)

1. That the above mentioned suit is for partition of the joint family properties of the plaintiff and defendants.

2. That the defendant No. 1, is the uncle and defendants 2 and 3 are the cousins of the plaintiff.

3. That ever since the death of the applicant's father defendant No. 1, has been managing all the joint family properties as *Karta* of the family.

4. That the average net annual income of the said properties is about Rs. 25,000/-

5. That in April last, owing to certain differences arising from defendant No. 1 refusing to allow proper clothing and pocket expenses to the applicant and ill-treating his wife, the applicant had to remove himself from the family dwelling house to a rented house at.....and has since been living separately from the defendants.

6. That the applicant has no other source of income except the joint family property which is in the exclusive possession of defendant No. 1.

7. That the defendant No. 1 has refused to allow the applicant anything for his maintenance and the applicant is living on money borrowed from other relations.

8. That the partition suit is likely to take several years in disposal.

9. That in the circumstances stated above it is just and convenient that a receiver should be appointed of the said joint family properties.

It is therefore prayed that :—

(a) A receiver be appointed of the joint family properties detailed in the plaint pending the disposal of the suit or until further order;

before a preliminary decree has been passed (*Nanda v. Kandhaiyalal*, 1918 A. M. L. J. 90; *Mahmud Begum v. Sultan Ahmad*, 189 I. C. 729, 1940 (Lah.) 125). It can, however, be granted only by the court in which

- (b) Defendant No. 1 be directed to hand over to the receiver all the said properties and such other joint family property as may be found in his possession, together with all documents, books of accounts and papers relating to the said joint properties.
- (c) The receiver be directed to pay to the applicant a sum of Rs. 1,000/- to liquidate the debts incurred by the applicant for his maintenance and expenses of the suit.
- (d) The receiver be directed to pay to the applicant monthly Rs. 50/- on account of house rent and Rs. 100/- on account of expenses or such other sums as the court may think fit and reasonable until the disposal of the suit.
- (e) Such other orders be made as the court thinks fit and reasonable.

No. 54—Application for stay of execution pending appeal (made to the court passing the decree)

1. The applicant wishes to file an appeal from the decree in the above case.

2. The applicant is ready to give security to the satisfaction of the court for the due performance of such decree or order as may ultimately be binding upon him.

For the reasons disclosed in the annexed affidavit the applicant prays that the execution of the decree be stayed pending disposal of the appeal from the said decree.

Affidavit

1. I make oath and say that I have applied for copies of judgment and decree in this case for appeal, but the same have not yet been delivered to me.

a proceeding is pending and cannot therefore be granted by the court passing a preliminary decree when an appeal is pending against that decree in another court (*Chidambaram v. Perthaperumal*, 168 I. C. 80, 1937 (Mad.) 163).

2. I make oath and say that the plaintiff has put his decree in execution and has prayed for demolition of my house in execution of the said decree.

3. I make oath and say that a reconstruction of the house will cost at least Rs. 5,000 and the materials of the demolished house will be worth not more than Rs. 1,500.

4. I make oath and say that I shall be rendered homeless and it will be very difficult for me to procure another house before the next rainy season is over.

No. 55—Application for stay of execution pending appeal (made to the appellate court)

For reasons given in the annexed affidavit, the applicant prays that execution of the decree appealed from be stayed pending disposal of this appeal. The applicant is prepared to furnish security to the satisfaction of the court for the due performance of such order or decree as may ultimately be binding upon him.

Affidavit

1. I make oath and say that the respondent has put the decree appealed from in execution in the court below five days ago and has prayed for demolition of my house.

2. I make oath and say that the lower court has issued an order to the Amin to demolish my house.

No. 56—Application for a review of judgment (ff)

.. .. . *Plaintiff*
versus

.. .. . *Defendant*

The above-named defendant begs to present this application under O. 47, R. 1, C. P. C. for review of the judge-

The affidavit accompanying an application for appointment of receiver should make out a strong case, and should give full particulars, with instances, if necessary, of all charges laid against the opposite party.

(ff) Such application shall be in the form of a memorandum of appeal (O. 47, R. 3). An affidavit is generally filed in support of the

ment, dated November 14, 1924, in the above case from which no appeal is allowed by law (or, from which no appeal has been preferred) and sets forth the following grounds for review, namely :—

1. That the applicant has, on May 12, 1925, discovered among the papers of Ram Ratan deceased new and important evidence, to wit, a diary kept by the said Ram Ratan deceased containing an entry about the birth of the applicant.

2. That the said diary was not, in spite of the exercise of due diligence, within the knowledge of the applicant at the time the decree was passed.

3. That the said diary would have altered the finding of the court about the legitimacy of the applicant, on which finding the decree sought to be reviewed has been passed.

(Or, 1. That the plaintiff had, on the date of issue, (i.e., June 16, 1924), admitted that Saruplal's share in the house mentioned at No. 12 in the list of the property in suit was only one-half and the other half belonged personally to the defendant-applicant.

2. That on the finding that the plaintiff was, and the defendant-applicant was not, the heir of the said Saruplal, the court passed a decree for possession of the whole of the said house against the applicant.

3. That this is a mistake which is apparent on the face of the record.)

(Or, 1. That the decree sought to be reviewed was passed on the ground that the Revenue Court of an Assistant Collector had passed a decree for the applicant's ejectment and the applicant's tenancy had thus been determined.

grounds of review. The application need not be verified. Fraud or undue influence unaccompanied by the discovery of new matter is no ground for review of even a compromise decree (*Nathu Lal v. Raghubir Singh*, 23 A. L. J. 1029, 1926 (All.) 50).

Where there is an error apparent on the face of the record, whether the error occurred on account of the Counsel's mistake or it crept in by reason of an oversight on the part of the Court is not a circumstance

2. That the said decision of the Assistant Collector has on appeal been set aside by the Commissioner of the Allahabad Division, by an order passed after the decree of this court, that is, on February 25, 1925).

The relief sought by this application is to have the said decree set aside and the case re-heard and determined.

No. 57—Application for permission to appeal as a pauper (O. 44, R. 1) (gg)

1. The applicant begs to prefer an appeal from a decree passed against him in suit No. 136 of 1926 by the First Class Subordinate Judge of Surat.

2. The applicant is not possessed of means sufficient to enable him to pay the court-fee prescribed by law for the memorandum of the said appeal.

3. The whole of the movable and immovable property owned and possessed by the applicant, with the estimated value thereof, is specified at the foot of this application.

The applicant prays that he may be allowed to appeal as a pauper.

APPLICATIONS UNDER OTHER ACTS

No. 58—Application for the appointment of guardian of a minor (hh)

1. The applicant desires to be appointed guardian of the person and property of the minors hereinafter named and described.

which can affect the exercise of jurisdiction of the court to review its decision (*Jamna Koer v. Lal Bahadur*, 1950 F. C. 131).

Limitation : period of limitation is 30 days from the date of judgment sought to be reviewed under Art. 124 in cases other than judgments of Supreme Court.

(gg) See Chap., XV *ante*.

(hh) See Sec. 10, Guardians and Wards Act. The application should be signed and verified as a plaint. A declaration of the willingness of the proposed guardian to act should be filed with the application. It should be signed by the declarant and attested by at least two witnesses. The application may be made by the person desiring to be

2. The particulars required by Sec. 10 of the Guardians and Wards Act are as follows :—

- | | |
|-------------------------|--|
| (a) Names of the minors | { 1. Rameshwar Singh. |
| | { 2. Smt. Ramkali. |
| Sex | { 1. Male. |
| | { 2. Female. |
| Date of birth | { 1. June 8, 1914. |
| | { 2. August 10, 1912. |
| Ordinary residence | { Village Rupa, Tahsil Shahgunj, District Jaunpur. |

(b) The minor Smt. Raj Kali has been married to the petitioner, Ram Prasad, who is 25 years of age.

(c) The nature, situation and approximate value of the minor's property is shown in Schedule A annexed to this application.

(d) The applicant, Ram Prasad, resident of the said village Rupa, has the custody of the person of the minor, Smt. Raj Kali. Smt. Shama of village Rupa has the custody of the person of Rameshwar Singh, minor. The said Smt. Shama is in possession of the property of the minors.

- | | | |
|---|---|--|
| (e) Names and residence of the near relatives of the minors | { | 1. The applicant. |
| | | 2. Smt. Shama, mother's sister of the minors, resident of village Rupa. |
| | | 3. Ram Kishen, mother's brother of the minors, resident of Shahgunj, District Jaunpur. |

(f) No guardian of the person or property of the minors has been appointed.

appointed or by any relative or friend of the minor or by the Collector. This form is not for an application by the Collector, which may be in the form of a letter and may be sent by post. In a joint Hindu family the manager is the guardian and no other guardian can be appointed (*Raja Ram v. Rameshwar*, 161 I. C. 605, 1936 (Cal.) 270; *Jagannath v. Chunilal*, 1940 (All.) 416, 1940 A. L. J. 511), except for separate

- (g) So far as the applicant knows, no application for such appointment has ever been made before.
- (b) The application is for the appointment of a guardian of the person and property of the minors.
- (i) The applicant is the husband of Smt. Raj Kali minor. He is the only male relative of the minors in the village. He is an educated man and looks after and manages his own property also, which is of considerable value. He can personally manage the property of the minors with advantage to the minors. He can look after the education of the minor Rameshwar Singh much better than their old aunt, Smt. Shama.
- (i) The application has been made because the education of Rameshwar Singh is being neglected and the property is managed by Smt. Shama through her Karinda, Abdul Karim who has not been properly managing it, and profits have decreased since the death of the minor's father. Besides, there are some debts due from the said father, interest on which is increasing. The applicant wants to pay up these debts by selling a portion of the property.

The applicant prays that he be appointed guardian of the person and property of the said minors.

property of the minor (*Sadburam v. Prithi Singh*, 161 I. C. 861, 1936 (Lah.) 220). If a guardian has been appointed, court cannot appoint another without the former's removal (*Abdul Qadir v. Mt. Fatima*, 41 P. L. R. 12). The Lahore High Court has ruled that guardian should not be appointed when a minor is 17 years old (*Vishwanath v. Mt. Karan Devi*, 182 I. C. 992, 1939 (Lah.) 221). Sec. 17 of the Guardians and Wards Act gives the Court a very wide discretion. Whenever the court finds that it is for the welfare of the minor that a certain person should be appointed guardian the court can exercise its jurisdiction and appoint such a person as guardian. (The true rule under Sec. 17 stated in *Haliman Khatoon v. Ahmadi Begum*, 1949 All. 627).

The particulars required to be mentioned in the application are given in Sec. 10.

No.59—Application for an order declaring the applicant to be a guardian (ii)

1. The applicant desires to be declared guardian of the minors hereinafter named.

2. The particulars required by Sec. 10, Guardians and Wards Act, are as follows :—

- (a), (b) and (c) as in previous application.
- (d) The applicant has the custody and possession of the person and property of the minors.
- (e), (f), (g) and (h) as in the previous application.
- (i) The applicant is the legal guardian of Smt. Raj Kali, minor, under the Hindu law, and he has been appointed guardian of the person of Rameshwar Singh and of the property of both the minors by the will of the father of the minors, dated June 14, 1923. The applicant has been managing the said property and has been looking after the bringing up and education of Rameshwar Singh since the death of the said father of the minors in July, 1923.
- (j) The property of the minors is under a mortgage, interest on which is increasing day by day, therefore the applicant wants to make some arrangement to pay it off by selling a small portion of the property, hence a certificate from the court is required.

The applicant prays that he may be declared to be the guardian of the person and property of the said minors.

(ii) When a person is either the natural and *de facto* guardian of the minor as a father, or has been appointed by the will of minor's father, he may obtain a declaration by the District Judge that he is a guardian and then he will be in the same position as a guardian appointed by the District Judge, though in the case of a natural guardian, it is not necessary, as such declaration will not enhance his powers (*Sivasankar v. Radha Bai*, 1939 (Mad.) 611). He need not obtain a probate of the will before making the application (*Ganesh Ji v. Mt. Bhagirathi*, 163 I.C. 242, 1936 (All.) 368). Apart from the Guardians and Wards Act, application for permission for transferring the property of the minor by natural

No. 60—Application for temporary protection of minor's property under Sec. 12

1. The applicant has made an application for his appointment as guardian of the property of Subhan Ali minor, and May 12, 1926 is fixed for hearing the said application.

2. Qurban Ali, the deceased father of the said Subhan Ali, has left, besides other property, a standing wheat crop which is quite fit for being reaped, and there is a danger of its being damaged if it is not reaped and stored without delay.

3. The applicant wanted to reap and store the crop for the benefit of the said minor but was obstructed by Karim Baksh and Qadar Baksh who are distant cousins of the said Qurban Ali.

4. The estimated value of the produce or the said crops is about Rs. 3,000. The said Karim Baksh and Qadar Baksh are men of no means, and if they cut away the crops, as they intend doing, it will be impossible to realise the value of the produce from them.

5. The applicant prays that the said crop be placed in the temporary custody of the applicant or some other suitable person, so that it may be reaped and stored without unnecessary delay.

No. 61—Application under Sec. 12 to stop threatened marriage of a minor (jj)

1. The applicant is the mother's brother of Kumari Jamna Kuar minor and has made an application for appointment of a guardian of the person of the said Jamna Kuar.

guardians of persons governed by the Hindu Minority and Guardianship Act, 1956, have also to be made under section 8 of that Act. The provisions of the Guardians and Wards Act, 1890, apply in respect of such application and they are to be drafted in a similar manner.

(jj) An application under this section can be made only after an application for appointment of guardian has been filed as the power

2. The said Kumari Jamna Kuar is a girl of 14 years of age and is at present living with her step-mother, Smt. Shama at village Raju Nagar.

3. The said Smt. Shama has betrothed the said Kumari Jamna Kuar to one Rati Ram, son of Hari Ram, of village Kasora, and the marriage has been fixed for January 20, 1926.

4. The said Rati Ram is an old man of 53 and is suffering from asthma and is in no case a fit and proper match for this said Kumari Jamna Kuar.

5. Unless the said Kumari Jamna Kuar is taken out of the custody of the said Smt. Shama, she will be married to the said Rati Ram on January 20, 1926.

The applicant prays that Smt. Shama be ordered to produce the said Kumari Jamna Kuar before the court or at such place and time as the court considers proper, and be placed in the temporary custody of the applicant or some other near relation or other person as the court thinks fit, pending final orders for the appointment of a guardian of her person.

No. 62—Application by a guardian for permission to sell the property of the ward

1. The applicant has been appointed guardian of the property of Ram Krishen Singh and Smt. Raj Kali by order of this court, dated November 24, 1924, in miscellaneous case No. 400 of 1924.

2. The said property is subject to the debts specified in Schedule A at the foot of this application and the said debts are binding on the minors.

3. Interest of Rs. 60 per mensem is accruing due on the said debts.

4. One of the creditors Janki Prasad, is threatening to sue for the sale of the property mortgaged to him.

under this section is ancillary to the appointment of guardian and the section does not give summary power to any court, where no application for appointment of guardian has been made.

5. Of the three houses owned by the minors, one is sufficient for their residence and the remaining two are lying in a ruined condition and the minors have no income from them.

6. One Himmat Singh, son of Jaswant Singh, of Jaunpur offers Rs. 15,000 for the said two houses and the price offered is a fair and reasonable one.

7. By the sale of these houses all the debts due from the said minors will be satisfied.

The applicant prays permission to sell the said houses to Himmat Singh or to any other purchaser who might offer more than Rs. 15,000.

PETITIONS UNDER INDIAN SUCCESSION ACT

No. 63—Application for a succession certificate (kk)

1. Jan Muhammad, son of Sher Muhammad of Lucknow, died on November 14, 1959.

2. The said Jan Muhammad ordinarily resided at the time of his death, at Varanasi, within the local limits of this court, (or, the said Jan Muhammad owned a house and 2 shops in Dal-ki-Mandi in the city of Varanasi).

3. The following are the members of the family and near relatives of the deceased:—

Names of relatives and members of family Residence.

*	*
*	*
*	*

4. The applicant is the son and one of the legal heirs of the deceased.

(kk) Such applications should be signed and verified as plaints. If the applicant is a minor, he must apply through a next friend (*Ram Kuar v. Sardar Singh*, 20 A. 352; *Mahadeo v. Gangadhar*, 29 B. 344; *Periah v. Lakshmi Devi*, 61 I. C. 797; *Contra*). In the *Matter of Dhanibai*, 10 I. C. 981 where it has been held that a guardian duly appointed can alone apply on behalf of a minor. No certificate can be granted for part of a debt (*Ghafur Khan v. Kalandari*, 8 A. L. J. 79, 33 A. 327, 9 I. C. 127). A joint certificate may be granted to several claimants (*Daw Obn*

5. There is no impediment to the grant of the certificate or to the validity thereof if it were granted, either under Sec. 370 or any other provision of the Indian Succession Act or any other law.

6. The following are the debts and securities for which the certificate is applied for :—

Debts

Serial No.	Name of debtor.	Amount due on date of application.	Description and date of instrument by which debt is secured.
1	*	*	*
2	*	*	*

Securities

Serial No.	Distinguishing No. or letter	Name, title or clsas	Amount of per value	Market value on the date of the application
1	*	*	*	*
2	*	*	*	*
3	*	*	*	*

The applicant prays that (a succession certificate be granted to him for collection of the debts and securities specified in para. 6 above, and the petitioner may further be empowered by the said certificate to receive interest or dividends on, and to negotiate or transfer, the said securities).

Burnt v. Daw Saw, 1937 Rang. 336, 172 I. C. 54, 1937 R. 437). The right is a personal one and does not survive to the legal representatives (*Hamida v. Rabia*, 1937 A. M. L. J. 40). Necessary fee prescribed by the Court-fees Act must be paid in cash along with the application. Where a widow gets a share under Hindu Widow's Right to Property Act, 1937, she does not take by survivorship or inheritance and no certificate is required (*Natarajan v. Perumal*, 1943 (Mad.) 249; *Indian Leaf Tobacco Development Ltd. v. K. Kotayya*, 1955 A. P. 135, Contra, 1943 Nag. 243).

An application for succession certificate is made under Sec. 372, Indian Succession Act (Act XXXIX of 1925). It should be made to the District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death or if at that time he had no fixed place

No. 64—Application for extension of a succession certificate

1. The applicant was granted a succession certificate dated January 14, 1924, by this court in miscellaneous case No. 54 of 1923.

2. The applicant prays that the said certificate may be extended to the following debts and securities.

Particulars of debts and securities

(To be given as in precedent No. 63)

No. 65—Application for revocation of succession certificate under Sec. 383

1. In miscellaneous case No. 41 of 1928 in the goods of late Jan Muhammad of Lucknow, one Sher Muhammad of Lucknow was granted a certificate under Part X of the Indian Succession Act of 1925 to collect the debts due to the deceased Jan Mohammad.

2. The case was decided *ex parte* on August 22, 1928.

3. The deceased, at the time of his death, left behind him the following relations, namely,

(i)

(ii)

(iii)

4. At the time of making the application the said Sher Mohammad fraudulently concealed the names and particulars of the relations above named.

5. In the petition the said Sher Mohammad described himself as the sole surviving heir of the deceased.

6. The deceased was a Shia Muhammadan and according to Muhammadan Law of the Shia School your petitioner is a preferential heir to the estate of the deceased.

7. With the intention of keeping your petitioner in the dark the said Sher Mohammad fraudulently suppressed

of residence, the District Judge within whose jurisdiction any part of the property of the deceased may be found.

all the process of this court and made untrue allegations in his petition.

Your petitioner prays that the said certificate granted to Sher Mohammad be revoked.

No. 66—Application for probate (11)

1. The writing herewith annexed is the last will and testament of Gopal Chondra Chaterji, son of etc. and was duly executed by him in the presence of the witnesses named in the said will.

2. The testator died on January 4, 1922.

3. Your petitioner is the executor named in the said will.

4. The said testator had a fixed place of abode (or had a house) at Hoogly within the jurisdiction of this court.

5. The amount of the assets which are likely to come to the hands of your petitioner is Rs. 25,000, an account of which is given in Schedule A annexed to the affidavit filed with this petition. The amount of the liabilities and other lawful deductions of the said testator is Rs. 11,000, an account of which is given in Schedule B annexed to the same affidavit.

Your petitioner prays that probate of the annexed will may be granted to him.

No. 67—Application for probate to have effect throughout India

1-4. *As in last precedent.*

5. (*As in last precedent*—Then add—

Of the assets aforesaid, assets of the value of Rs. 20,000 are situate in the State of West Bengal within the jurisdiction

The definition of the expression "District Judge" as given in the Succession Act does not include a High Court which has not got original civil jurisdiction (*In re Rajendra Chandra Sen*, 1934 All. 958; *In the matter of Sailendra Krishna Roy*, 1949 Pat. 318).

(11) The application for probate is made under Sec. 276 Succession Act. It is to be signed and verified as a plaint and shall also be verified by one of the witnesses to the will in the form given in Sec. 281, Indian

of this court, and assets of the value of Rs. 5,000 are situate in Uttar Pradesh within the jurisdiction of the Allahabad High Court and the District Judge of Varanasi.)

6. To the best of your petitioner's belief, no application has been made to any court for a probate of the said will intended to have effect throughout India (or, in July 1956, application was made to the court of the District Judge of Varanasi by one Ram Lal Chatterji for a grant of the probate of the said will to him, and the same was, on November 15, 1956, dismissed on the ground that the said Ram Lal Chatterji was not appointed executor by the said will).

Your petitioner prays that probate of the annexed will to have effect throughout the whole of India may be granted to him.

No. 68—Application for probate of copy of a will

1. Ram Lal of Calcutta, deceased, died on July 4, 1926 at Calcutta having made and duly executed his last will and testament bearing date July 20, 1922, whereof he appointed his sister your petitioner, sole executrix.

2. At the time of the death of the said Ram Lal, the said will was whole and unrevoked and was in the same state as when executed but since the death of the said Ram Lal the said will has been lost and cannot be found.

3. That during the lifetime of the said Ram Lal and at his request a copy of the said will was made by Ram Chandra Nag of Calcutta, Solicitor, and the same was by him examined with the original will and found to agree therewith.

Succession Act. The applicant should annex to the petition the will or in the cases mentioned in Sections 237, 238 and 239, a copy, draft or statement of the contents thereof. Probate can be granted even if a part of the will is lost, provided evidence of its contents is forthcoming (*Kedar Nath v. Raj Kumar*, 185 I. C. 17, 1939 (Cal.) 674). An affidavit shall also be filed with the application in the form given in Schedule III to the Court-fees Act. A minor cannot apply for probate. Sec. 223 Succession Act provides that probate cannot be granted to a minor or a person of unsound mind, nor to an association of individuals unless it is a company which satisfies the conditions prescribed by rules to be

4. Your petitioner believes the paper hereto annexed to contain the true last will and testament (being the copy thereof as aforesaid) of the said Ram Lal and your petitioner is the executor named in the will.

5. *As in precedent No. 66.*

Your petitioner prays that the probate of the copy of the said will be granted to him limited until the original or a properly authenticated copy of the same is produced before the court.

No. 69—Application for probate of draft of a will

1. and 2. *As in the last precedent.*

3. The said will was prepared by Amarnath Nag., Solicitor, who has preserved a draft of the same, which your petitioner has obtained from the said solicitor and annexes to this petition.

4. Your petitioner believes that the said draft contains a true last will and testament of the said testator, and your petitioner is the executor named in the said will.

Prayer—*As in last precedent, substituting the word “draft” for “copy”.*

No. 70—Application for probate of copy of a will when original is abroad

1. *As in precedent No. 68.*

2. That the said will was executed by the said Ram Lal when he was at London in the Kingdom of the Great Britain and the same was deposited by the said Ram Lal after execution thereof with Saunders & Co., Solicitors of London aforesaid, who still retain possession of the said will.

3. That on August 20, 1927, a copy of the said will was sent to your petitioner by the said Saunders and Co.,

made by the Union Government. In Probate Court the validity of the provisions of the will cannot be questioned (*Mt. Laso Devi v. Mt. Jagatambha Devi*, 163 I. C. 656, 1936 (Lah.) 378).

Under Sec. 300 (1) of the Succession Act the High Court shall have concurrent jurisdiction with the District Judge in the matter of grant of probate or letters of administration.

the same having been examined by them with the original and found to agree therewith. The said solicitors have, inspite of repeated request from the petitioner, neglected to deliver up the original to him.

4. So far as your petitioner is aware there is not now in India a more authentic copy of the said will than the afore-said copy and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original.

5. *As in precedent No. 66.*

Your petitioner prays that probate may be granted of the copy of the said will limited until the will or authenticated copy of it is produced.

**No. 71—Application for probate of the contents
of a lost will**

1 and 2. *As in the last precedent.*

3. The said will was executed in the presence of your petitioner and no draft of it was made and so far as your petitioner knows no copy of it has ever been prepared.

4. The purport of the said will, to the best of the recollection of your petitioner, was that the testator gave the whole of his zamindari property to your petitioner, his house at No. 13 Cotton Street, Calcutta, to his widow, Smt. Ram Kali and the whole of his cash in deposit in the State Bank of India, Calcutta Branch, to his nephew, Ram Das.

5. *As in precedent No. 66.*

Your petitioner prays that probate of the contents of the said will as stated above may be granted.

**No. 72—Application for revocation of probate
under Section 263**

1. Your petitioner is the executor of the last will, dated May 14, 1926, Atul Chandra Bose, late of Hoogly, deceased, who died on April 22, 1927.

2. One Krishna Das Bose obtained from this court a probate of pretended will of the said Atul Chandra Bose dated August 14, 1925 after concealing all the processes of this court.

3. The said Atul Chandra Bose did not execute the will, the probate of which has been obtained by the said Krishna Dass Bose from this Court on July 20, 1928.

4. Alternatively, the said will was impliedly revoked by the later will mentioned in paragraph (1) of this petition.

Your petitioner prays that the grant of probate to Krishna Das Bose of the pretended will of Atul Chandra Bose be revoked and such other orders may be passed as may be deemed necessary.

No. 73—Application for letters of administration under Sec. 278

1. The late Atul Chandra Bose died intestate on February 10, 1923, at Alipore.

2. The said Atul Chandra Bose had, at the time of his death a fixed place of abode (or had a shop at Alipore), within the jurisdiction of this court.

3. The following are the members of the family and relatives of the said Atul Chandra Bose:—

<i>Names</i>	<i>Residence</i>
* * * * *	*

4. Your petitioner is the son of the said Atul Chandra Bose and his legal heir.

5. The Amount of assets, etc., (as in para. 5 of application No. 66).

Your petitioner prays that letters of administration to the estate of the said Atul Chandra Bose be granted to him.

No. 74—Application for letters of administration with will annexed

1 and 2. *As in precedent No. 66.*

3. Ram Chandra Chatterji, the son of the deceased and sole executor named in the said will, survived the said

deceased but has since died without having taken the probate of the said will.

4. Your petitioner is the grandson of the said deceased and one of the residuary legatees named in the said will.

5. Your petitioner will administer according to law all the assests which by law devolve on or vest in the personal representatives of the said deceased.

6. The said testator had, at the time of his death, a fixed place of abode (or had a shop) at Hoogly within the jurisdiction of this court.

7. The following are the members of the family and representatives of the said Gopal Chandra Chatterji :—

(i)

(ii)

(iii)

8. *As para 5 in precedent No. 66.*

Your petitioner prays that letters of administration with will annexed to the estate of the said Gopal Chandra Chatterji be granted to him.

No. 75—Application for appointment of a Curator under Section 192

1. Ganesh Prasad of Kaimganj, district Farrukhabad deceased, died on the 20th day of July, 1928, at Kaimganj within the jurisdiction of this court.

2. The said Ganesh Prasad died being possessed of movable and immovable property situate within the jurisdiction of this court.

3. The said deceased was not a member of a joint Hindu family and your petitioner is the lawfully married wife of the said deceased and is, according to Hindu Law, his only heir.

4. One Sheo Prasad falsely alleging himself to be the adopted son of the said Ganesh Prasad, deceased, has forcibly and illegally taken possession of the residential house

of the deceased and all his movable property and threatens to take forcible possession of immovable property also.

5. The said Ganesh Prasad also carried on a money lending business on an extensive scale and large amounts of money are due to his estate on bonds and pronotes and your petitioner has been informed that the said Sheo Prasad is realising monies of these bonds and pronotes.

6. The said Ganesh Prasad had also an extensive business of sugar manufacture at Kaimganj and the said Sheo Prasad has also taken possession of the said business and your petitioner has been informed that he is removing various articles of the said business including the account-books.

Your petitioner will be materially prejudiced and will not get any effective relief by a regular civil suit if a curator is not appointed at once.

Your petitioner prays that a curator may be appointed to the estate of Ganesh Prasad deceased.

PETITION UNDER INSOLVENCY ACT

No. 76—Petition for insolvency, by debtor

1. Your petitioner has become heavily indebted owing to certain business losses and is unable to pay his debts.

2. Your petitioner ordinarily resides at Varanasi within the jurisdiction of this court, (or, the petitioner is imprisoned in the Civil Jail at Varanasi).

3. An order for attachment of the property of your petitioner in execution of decree No. 104 of 1959 passed by the Munsif's Court at Varanasi has been made by that court (or, your petitioner has been arrested and imprisoned in the civil jail by order of the Munsif at Varanasi, in execution of decree No. 104 of 1959 passed by him).

4. The amount and particulars of all pecuniary claims against your petitioner, with the names and residences of his creditors, so far as they could be found, are specified in Schedule A, annexed to this petition.

5. The amount and particulars of all your petitioner's property together with its value and the place at which it is to be found, are fully specified in Shedule B, annexed to this petition and your petitioner is willing to place all the said property at the disposal of the court.

6. Your petitioner has not, on any previous occasion, filed a petition to be adjudged an insolvent or, the petitioner made a petition to be adjudged an insolvent on October 1, 1960 in the court of the District Judge at Ghazipur, but the same was dismissed as the court then held that the petitioner's assets were enough for his debts.

Your petitioner prays that he may be adjudged insolvent.

No. 77—Petition for insolvency, by a creditor (mm)

1. Ramnath, son of Shamlal Brahman, of village Pachenda, Tahsil Khurja, District Bulandshahr, is indebted to your petitioner in the sum of Rs. 4,300 due on a bond, executed by him on February 4, 1923.

2. The said Ramnath ordinarily resides in the said village Pachenda within the jurisdiction of this court.

3. The shop of the said Ramnath in the village Pachenda has been sold on January 5, 1923, in execution of a money decree No. 503 of 1922, passed by the Munsif at Khurja for payment of Rs. 354 and costs.

Your petitioner prays that the said Ramnath be adjudged insolvent.

**No. 78—Application for a protection order under
Sec. 31 (nn)**

1. The applicant has been adjudged insolvent by an order of this court, dated December 10, 1958.

(mm) It is necessary for the petitioning creditor to allege the acts of insolvency complained of by him in the petition and specify particulars as to the time and place of their commission. It is, however, not necessary for him to aver that the debtor is unable to pay his debts. (*Jagannath v. Badri Prasad*, 1949 E. P. 359).

(nn) This application will be necessary only about debts in respect of which suits and proceedings are pending on the date of adjudication

2. One Ram Bilas, son of Ram Kumar, Vaish, of Kanpur, holds a decree No. 154 of 1956 passed against the applicant by the court of the Civil Judge at Kanpur.

3. The said Ram Bilas has applied to the Court of the Civil Judge at Kanpur for execution of the said decree by the arrest and detention of the applicant, and the said court has, by an order, dated March 24, 1922, refused to stay the execution proceedings and has passed an order for the issue of a warrant for the applicant's arrest.

The applicant prays that an order for his protection from arrest and detention in execution of the said decree be passed.

No. 79—Application for discharge (under Sec. 41)

1. The applicant was adjudged insolvent by an order of this court, dated April 24, 1924.

2. The applicant was directed by the said order to apply for his discharge within one year from the said order.

3. The debts of the applicant entered in the schedule have been paid off by the Receiver to the extent of 11 annas in the rupee.

The applicant prays for an order of his discharge.

No. 80—Application for annulment of adjudication (Sec. 43)

1. The opposite party was adjudged insolvent by an order of this court, dated March 23, 1923.

2. By the said order, the opposite party was directed to apply for his discharge within two years.

3. The said period of two years has expired and the opposite party has not yet applied for his discharge.

The applicant prays that the said order of adjudication, dated March 23, 1923, be annulled.

as no proceeding can legally be taken in respect of other debts after the date of adjudication (Sec. 28 (2)). The insolvent can move the court in which proceedings are pending against him for an order staying the

No. 81—Application under Sec. 53 for avoidance of a transfer

1. The opposite party No. 1 was adjudged insolvent by this Court by an order dated October 25, 1929 and the applicant was appointed Receiver of his property.

2. The opposite party No. 1 has on December 30, 1927 transferred by a deed of gift the property detailed at the foot of the application in favour of the opposite party No. 2.

(Or, the opposite party No. 1 has made various transfers of portions of his property in favour of the opposite parties Nos. 2-9. Full particulars of the said transfers with their dates are mentioned in Schedule A annexed hereto and which should be treated as part hereof).

3. The opposite party No. 1 was adjudged insolvent on a petition presented by him within two years after the date of the said deed of gift, (or, within two years after the dates of the said transfers) that is, on June 10, 1929.

The applicant prays that the said deed of gift may be declared void as against him and may be annulled.

No. 82—Application by Receiver under Sec. 54 (1) for avoidance of fraudulent preference

1. *As in para, 1 of the last precedent.*

2. The opposite party No. 1 transferred his house by a deed of sale dated May 20, 1929 in favour of opposite party No. 2 in consideration of a private debt due to the latter from opposite party No. 1.

3. The opposite party No. 1 was indebted to a large number of persons, and, being unable to pay his debts as they became due from his money, has executed the sale deed in favour of the opposite party No. 2 with a view to giving him preference over the other creditors.

proceedings (under Sec. 29), and if the order for stay is not made, he will have to obtain a stay order,

4. That the opposite party No.1 has been adjudged insolvent on a petition presented by some of his creditors within three months after the date of the transfer specified in para. 2, that is on June 10, 1929.

The applicant prays that the said transfer may be declared void as against the applicant and may be annulled.

No. 83—Application of a third person for release of his property attached by receiver (Sec. 86)

1. The applicant is the owner of the house described at the foot of this application.

2. The official receiver has, on August 21, 1926, wrongfully attached the said house as the property of one Khuda Baksh insolvent.

The applicant prays that the said attachment of the said receiver be reversed and the said receiver be ordered to release the said property.

No. 84—Application under Sec. 83, Transfer of Property Act (oo)

1. On January 4, 1905, one Ram Ratan made a mortgage in favour of Janki Prasad deceased, now represented by the opposite party.

(oo) The application cannot be dismissed. If the tender is not accepted, the application will be simply shelved or deposited. If it has been shelved for non-appearance of the mortgagee, and the mortgagee appears at any time afterwards, the money cannot be paid out to him, except with the consent of the applicant. With the consent of both the parties, the case can be revived and money paid out to the mortgagee. It is not necessary that, on the date fixed for the return of notice to the mortgagee, the mortgagor should be present. Even if he is absent and the mortgagee accepts the tender, an order will be passed that the money be paid out to him.

If the mortgagee is a minor, the applicant should make an application for appointment of a guardian *ad litem* for him, but if a curator of the property or guardian of the property has already been appointed under the law (*e.g.*, under the Guardians and Wards Act), the tender can be made to him, and no proceedings for appointment of a guardian

2. Under the terms of the said mortgage-deed, the mortgage is redeemable in the month of *Jeth* any year.

3. The said Ram Ratan has sold a portion of the mortgaged property to the applicant by a sale-deed, dated May 4, 1918.

4. Rs. 6, 350 is due to the opposite party on the said mortgage.

5. The applicant deposits the said sum in court, and prays that a notice of the said deposit be issued to the opposite party.

No. 85—Reply to the above

1. The opposite party is willing to accept the money deposited by the applicant in full discharge of the mortgage money due to him.

2. The opposite party deposits the mortgage-deed in the court.

(Sd.)

Verification

need be taken. If proceedings for appointment of guardian are not properly taken the tender will not save the running of interest (*Phoolkuer v. Rewari*, 1930 A. L. J. 1020). If the applicant himself is a minor, he must apply through a guardian and should make an application for the formal appointment of the guardian for the purpose of the proceeding (Sec. 103, Transfer of Property Act), unless the guardian has been appointed by Court. If the mortgagee is dead the tender should be made in favour of all the heirs and if it is made in favour of some only interest will not cease to run (*Ram Gopal v. Lachmandas*, 1938 (All.) 423, 1938 A. L. J. 617). If the money deposited falls short of the total dues under the mortgage even by a small amount the mortgagee is not liable to accept the amount tendered and the interest on the mortgage money continues running. (*Debi Prasad v. Kedar Singh*, 1921 All. 280; *Sagar Mal v. Jwala Sahai*, 1946 J. L. R. 97). The reply of the mortgagee must clearly state that he accepts the order in full discharge of the mortgage and the money will not become his until such consent has been signified (*Kunjunni v. Sankarnarain*, 28 T. L. J. 633). It is not open to the court to decide or pass any order on any points of dispute in case the mortgagee does not file a verified petition accepting the money deposited but files objections. In such a case the court should simply order that the application be filed. (*Suryanarayana Rao v. Srinivas Rao*, (1949) 54 Mys. H. C. R. 136). Sec. 83 will not be applicable once a suit is filed (*Raj Krishna Menon v. Sundaram Pillai* 1963 Ker. L. J. 1031)

APPLICATIONS UNDER THE INDIAN ARBITRATION ACT (pp)

No. 86—Application for appointment of an arbitrator S. 8 (i) (a)

1. By an agreement executed by the parties on the 23rd January, 1940 the applicant agreed to sell to the opposite party from time to time such quantity of silver as the opposite party wanted to purchase on the terms and conditions embodied in the said agreement.

2. Clause 15 of the said agreement provided that if any difference arose between the parties regarding any transaction of sale of silver made under the said agreement, it should be decided by arbitrator.

3. Several differences have arisen regarding several transactions of sale made by the applicant under the aforesaid agreement.

4. The applicant desired that the opposite party should concur in the appointment of an arbitrator for settlement of the aforesaid differences but the opposite party always put him off and never agreed to the appointment of an arbitrator.

5. On the 18th June 1944, the applicant sent a notice by registered post calling upon the opposite party to concur in the appointment of an arbitrator for settlement of the aforesaid differences under Clause 15 of the said agreement and the said notice was served on the opposite party on the 25th June 1944 and thus 15 clear days have passed and

(pp) Formerly the law of arbitration was in an imperfect state. Certain provisions were made in a schedule to the Code of Civil Procedure for arbitration in pending suits and enabling parties to outside arbitration to have agreements or awards filed in court. There was a separate Arbitration Act which contained general provisions about arbitration, but this applied only to presidency towns and was extended to certain big commercial towns. A new Consolidated Arbitration Act (Act X of 1940) has now been passed in 1940 which contains all the provisions of the old Arbitration Act and the C.P.C. and certain other provisions and applies to the whole of India. For arbitration in pending suits it contains elaborate provisions for appointment of arbitrators by court and defines the powers of arbitrators, it also provides for arbitration by some of the parties only interested in a part of the suit. This is a new provision. Wide powers have been given to courts to appoint arbitrators if parties neglect to do so or cannot agree about their ap-

the opposite party has not sent to the applicant any reply nor has he appointed or concurred in the appointment of an arbitrator.

The applicant therefore prays that the court will be pleased to appoint an arbitrator for settlement of the aforesaid differences between the parties.

**No. 87—Application for substitution of an arbitrator
(S. 8 (i) (b))**

1. By a deed of agreement of reference dated 5th October 1942, the parties appointed A, B and C arbitrators for making a partition of joint family property of the parties.

2. The arbitrators entered on the arbitration on the 25th October, 1942, but before they could complete the arbitration, arbitrator A died on the 2nd November 1942 (or, arbitrator A, by a notice sent by him to the applicant on the 2nd November, 1942 intimated his unwillingness to act as an arbitrator) (or, arbitrator A has on the 2nd November, 1942 been convicted of a criminal offence and sentenced to seven years rigorous imprisonment and has thus become incapable of acting as an arbitrator), (or arbitrator A ceased to attend arbitration proceedings and to proceed with the reference though requested by the applicant and by other arbitrators several times to do so, the last of such requests was made by the applicant by means of a registered notice served by post on the.....).

3. On the , the applicant sent by registered post a notice calling upon the opposite party to concur in the appointment of another arbitrator in place of the said A, and the said notice was served on him on the but though more than 15 clear days have passed the opposite party has not done so.

The applicant, therefore, prays that the court will be pleased to appoint another arbitrator in place of A.

pointment, and to remove them in case of neglect of duty or misconduct. The Act is self-contained and no proceeding otherwise than under the Act can be taken for a decision upon the existence, effect or

**No. 88—Application for appointment of an umpire
(S. 8 (i) (c))**

1. By a deed of agreement dated 8th December, 1941 the parties referred certain disputes between them to the arbitration of A and B.

2. By clause 7 of the said deed it was provided that in case of disagreement between the arbitrators, the latter should appoint an umpire.

3. Difference of opinions on several matters has arisen between the arbitrators and they are not agreed about their award, but they have not appointed an umpire.

4. By a notice sent by registered post and served on the said arbitrators on the 28th June, 1943 the applicant called on them to appoint an umpire but they have not yet done so.

The applicant, therefore, prays that the court will be pleased to appoint an umpire.

**No. 89—Application for removal of arbitrator, on
ground of neglect (S. 11 (i) (qq)**

1. By a deed of agreement dated 15th November, 1944 the parties referred certain disputes between them to the arbitration of A.

2. The said arbitrator did not enter on the reference for a long time, though requested several times to do so and the applicant served a notice on him by registered post on the 18th March, 1945 calling upon him to enter on and proceed with the reference but though more than 4 months have expired he has neglected to do so.

(Or, the said arbitrator entered on the reference on the validity of an arbitration agreement or award (S. 32). A suit to enforce an award in which the defendant denies the existence or validity of an award, is barred by Sec. 32, Arbitration Act. (*Ram Chandra Singh v. Munshi Mian*, 1950 Pat. 48; *Shri Ram v. Shripat Singh*, 1957 All. 106). Conversely if award is not filed in court suit on original cause of action is not barred by section. 32 (*Ram Sahai v. Babu Lal* A. I. R. 1965 All. 217).

(qq) In the absence of contrary agreement, an arbitrator is bound to finish the arbitration within 4 months (Sch. 1, Cl. 3) and if he does

15th December, 1944 and examined the parties but has done nothing further although he fixed several dates for hearing and the parties were ready with their evidence and account books, always postponing the case for one reason or another, which were all equally inadequate. The said arbitrator has thus failed to use reasonable dispatch in proceeding with the reference.)

For the above reasons the applicant prays that the said arbitrator be removed.

**No. 90—Ditto, on ground of misconduct (S. 11
(2)) (rr)**

1. By a deed of agreement dated the 15th November, 1944 the parties referred certain differences between them to the arbitration of A.

2. After the said reference, the said arbitrator accepted employment under the opposite party as his manager and has thus become biased and partial to him, (or, has taken a loan of Rs. 10,000/- from the opposite party) (or, after the reference, has entered into an agreement with the opposite party to give award in his favour in consideration of the latter giving to him a 1/4th share in the property in dispute) and has thus misconducted himself.

Or

2. The said arbitrator has misconducted the arbitration proceedings by doing the several acts particulars of which are given below :—

not, it is a neglect. Particulars of neglect should be specified in the application. If the award is delivered beyond 4 months it is invalid and can be avoided. (*Abdul Hakim Khan v. Dominion, Lahore Improvement Trust*, 1950 (Lah.) 132).

(rr) Misconduct of himself or of the arbitration proceedings renders arbitrator liable to removal before the award has been completed. After award, application for setting it aside may be made under Sec. 30. Under misconduct of himself, come such charges as bribery, partiality etc; under misconduct of proceedings come all other acts of general misconduct which may not necessarily involve moral turpitude. Not allowing the party to cross-examine witnesses of the opposite party, not acceding to a reasonable request for adjournment, association of a stranger in the proceedings, scolding or coercing a party to admit a certain fact, refusing to examine the relevant account books or other

Particulars of acts of misconduct

The applicant prays that the court will be pleased to remove the said arbitrator and appoint another arbitrator in his place or order that the arbitration agreement shall cease to have effect with respect to the differences referred to.

No. 91—Application for filing an award
(Sec. 14 (2)) (ss)

1. On the 14th day of January 1924, the applicant and the opposite party having a difference between them concerning the partition of their family property, agreed in writing to submit the said difference to the arbitration of Sri Radha Charan pleader of this court.

2. The said Sri Radha Charan entered upon the arbitration and made an award in writing on 20th April 1924.

3. The said arbitrator was requested by the applicant to file in court the award or a signed copy of it with depositions taken by him and documents proved before him but he has not complied with the request.

4. The applicants prepared to pay the fees and charges due in respect of the arbitration and award and the costs and charges of filing the award and other papers.

The applicant prays that the said arbitrator be directed to file in court the award with full record of depositions and all the documents proved before him by the parties, and upon his filing the same further proceedings be taken according to law.

documentary evidence or not to hear witnesses whose evidence was relevant etc. are instances of misconduct. After removal of arbitrator the consequences referred to in S. 12 will follow.

An applicant who raises no objection in respect of partial arbitrator knowing him to be partial all the time and takes the chance of the award turning out to be favourable to him in spite of such partiality cannot be permitted to put forward such grounds if ultimately the award turns out against him. *National Fier & General Insurance Co. v. Union of India*, 1956 Cal. 11; *Dhar Pvt. Ltd. v. Union of India* 68 C. W. N. 927

(ss) Formerly, under the C. P. C. an application for filing the award was made and was treated as a suit. Now, under Sec. 14 of the

No. 92—Application to modify an award (S. 15)

1. The parties referred their dispute to the arbitration of A who made his award and filed it in this court and the court has issued a notice of filing the said award to the applicant.

2. The applicant submits that the award is defective in the following respects :—

(a) The question of any maintenance allowance being paid by the applicant to his step-mother B was not referred to the arbitrator and therefore the portion of the award directing applicant to pay Rs. 10/- p.m., as maintenance to B is invalid;

(b) It is stated in the award that the applicant is entitled to get a sum of Rs. 10,000/- from the opposite party but the award is imperfect in so far as it does not specifically direct that the opposite party should pay that sum to the applicant;

(c) It is stated in para. 4 of the award that the applicant's share in the grove is $\frac{1}{4}$ th and in house $\frac{1}{3}$ rd but in the last paragraph the arbitrator has awarded to the applicant a $\frac{1}{3}$ rd share in the grove and $\frac{1}{4}$ th share in the house which is an error arising from an accidental slip.

(d) The applicants' half share in a shop has been recognized by the arbitrator in para. 9 of the award but by an

Arbitration Act the parties have been given a right to require the arbitrator to file the award in court. It is also provided that the arbitrator is bound to file the award if directed by the Court. Application for direction of the court will presumably be necessary only if the arbitrator fails to file the award at the request of the parties. The "court" is the court having jurisdiction in the subject-matter of the suit; but no application can be made in a small cause court (S. 23). The court may, if the award has been filed, modify or correct it under Sec. 15 or remit it for reconsideration under S. 16 or set it aside on a ground mentioned in S. 30 and in all such cases the order will be appealable (S.39). An application for setting aside or remitting an award can be made by any party including the one on whose application the award was filed. If the court does not pass any such order it shall pronounce judgment in terms of the award (Sec. 17) and a decree shall follow which will not be appealable. Decree can be passed on an award which is partly valid, if the part invalid is separable (*Md. Mustafa v. Md. Yar.* 1940

accidental omission this has not been mentioned in the last para., where the final award has been made.

The applicant therefore prays that the aforesaid defects in the award be removed by suitably modifying or correcting the same.

No. 93—Application for remitting an award (S. 16)

1. *As in the last precedent.*

2. In para. 3 of the agreement of reference dated.... the parties had also referred to arbitration the question of the applicant's right of way to the well through the grounds of house No.4, but the award has left this matter undetermined.

3. There was no dispute about house No. 5 which was in possession of the applicant and the question of partition of houses Nos. 1, 2, 3 and 4 only was referred to arbitration but the arbitrator has partitioned all the five houses by putting them in one hotch-potch, and the award about houses Nos. 1-4 is not separable from that about No. 5.

4. The award is indefinite in so far as it directs that the opposite party should give possession of house No. 1 to the applicant whenever he can conveniently shift to another house.

5. The award is illegal on the face of it in so far as it had awarded to the opposite party against the applicant a sum of Rs. 500/- on account of a contract which on the arbitrator's own finding was illegal and therefore void.

The applicant prays that the said award be remitted to the arbitrator for reconsideration within such time as the court may fix.

Lahore 24.) This is now the only remedy of a party to an award wishing to enforce it, as a suit for a decree on the basis of an award is now barred by Sec. 32. Limitation is 30 days from the date of award (Art. 119 (a)). Where in such a suit the other party filed a written statement challenging the reference and award, it was held that the written statement should be treated as an application under S. 33, and therefore the other party could appeal under S. 39, even though a decree was passed in terms of the award (*Gauri Singh v. Ram Lochan*, 1948 Pat. 430).

No. 94—Application to file agreement of reference (S. 20) (tt)

1. The applicants and the opposite party agreed in writing on January 4, to refer to the arbitration of Mohammad Hussain, a Vakil of Aligarh, the dispute between them concerning their respective rights to succeed to the property of Sayyed Mehdi Husain deceased.

2. The said agreement is annexed to this application. The applicants pray—

(1) That the said agreement be filed.

(2) That an order of reference to arbitration in accordance with the said agreement be passed.

(3) That a final decree be passed in accordance with the award of the arbitrator.

No. 95—Application for reference to arbitration in a pending Suit (S. 21) (uu)

1. The applicants are the parties interested in this suit.

(tt) An agreement to refer to arbitration a matter in a pending suit without the order of court cannot be filed under this Section, but the parties should in such cases proceed under S. 21 (*Dinkar Rai v. Yeshwant Rai*, 31 Bom. L. R. 140, 1930 (Bom.) 98). But if the suit is withdrawn, an application can be made under this section (*Ram Vallabh v. Dwarka Das* A. I. R. 1966 S. C. 402.) A valid and regular agreement before the application must be shown. It should be in writing but need not be signed (*Ghulamali v. Vishwambharlal*, 1949 Bom. 158, 51 Bom. L. R. 79; *Jugal Kishore v. Mrs. Gool Bai*, 1955 S. C. 812). A guardian mother of a minor is entitled to enter into such agreement on behalf of the minor (*Raghupati v. Ram Gopal*, 1939 (Cal.) 557), and so a manager of a joint Hindu family on behalf of other members (*Kanshi Ram v. Harnam Das*, 1940 (Lah.) 73). An agreement to which minor is a party is not void but voidable at his instance and other parties cannot challenge the award on this ground (*Ramakoteswara v. Suryanarayana*, A. I. R. 1940 (Mad.) 905). Notice under S. 80., C. P. C. is not necessary before filing such application, (*Ram Chand v. Governor-General* 1947 Sindh 147).

(uu) Where arbitration is made during the pendency of a suit, the reference should be made through court otherwise the award cannot be enforced (*Ramdayal v. Sheodayal*, 183 I. C. 128, 1939 (Nag.) 186; *I. G. H. Ariff v. Bengal Silk Mills*, 1949 Cal. 350; *Maung Hlay v. U. Ge*, 183 I. C. 343, 1939 (Rang.) 300). As "Court" as defined in the Act does not include appellate Court, the Collector has no power to refer a case in

2. The applicants agree that the following matters in difference between them be referred to the arbitration of Budh Singh, Nihal Chand and Ram Prasad, residents of village Qudauli, Pargana Hapur, District Meerut.

- (a) Whether the defendants executed the pronote in suit.
- (b) Whether the bond in suit was executed as security against losses on badhni transactions and not for a cash loan.
- (c) Whether the defendant purchased any grain for the plaintiff in 1891 *Sumvat*.
- (d) How much, if anything, is now due to the plaintiff from the defendant.

appeal to arbitration (*Abani Bhushan v. Hem Chandra*, 1947 Cal. 93, 50 C. W. N. 838, 81 C. L. J. 289; *Shukrulla v. Mt. Rahmat Bibi*, 1947 All. 304, 1947 A. L. J. 445, I.L.R. (1947) All. 227). But see *Mordhwaj v. Bhudar Das*, 1955 All. 353 where a Full Bench has held that an appellate court can make the reference (See also *Nachappa v. Subramaniam*, 1960 S. C. 307) but an execution court cannot (See *Contra* : 1948 A. L. J. 856 Or. 21 R. 2). Madras High Court has also held that the appellate court can refer the dispute to arbitration *Subramaniya v. Dave Das*, 1955 Mad. 693. Insolvency court is not a Civil Court, therefore no arbitration can be made in insolvency proceedings (*Mangilal v. Deo Chand*, 1949 Nag. 110). The application should be made by *all* the parties interested in the subject-matter of reference though not necessarily by *all* the parties to the suit. (*Hoassomal v. Kodanmal*, 104 I. C. 342; *Abdul Kadir v. Madhav Prabhakar*, 1962 S. C. 406). If a party does not give his consent, the reference and award are vitiated (*Sammiti v. Yallialwar*, 102 I. C. 2; *Tej Singh v. Ghosi Ram*, 102 I. C. 236; *Ahmad v. Sardara*, 114 I. C. 712, 1929 (Lah.) 171); but if the non-joining party is represented before the arbitrator, the proceeding will not be vitiated (*Jaisil v. Tel Ram*, 122 I. C. 100, 1930 (Lah.) 523). A *pro forma* defendant cannot be said to be a party interested *Raminder v. Mahinder*, 1940 (Lah.) 186, 190 I. C. 399, but an absent defendant against whom the plaintiff wants a decree is a person interested, (*Girja v. Kanai*, 43 I. C. 169, 27 C. L. J. 339; *Parasuram v. Muthu Swamy*, 1925 Mad. 120; *Sabta v. Dharmakirti*, 35 A. 107; *contra*, *Ajudhia v. Badrul Hasan*, 15 A. L. J. 427, 29 A. 489, 41 I. C. 357). In a case *A* sued *B* and *C* for partnership accounts, alleging that *C* had retired and was not liable. *C* was absent, but *B* pleaded that *C* was also liable. It was held that *C* was not a party interested (*Mahadeo v. Narayan*, 30 Bom. L. R. 530, 110 I. C. 343, 1928 (Bom.) 248). An important test is to consider whether a person is a necessary party or such that if not originally impleaded the court would direct him to be joined under O. 1, r. 10 (*Sharafatulla v. Mst. Bhagwati*, 1929 (All.) 763). Either the parties themselves or their agents specially

3. The applicants further agreed that in case of difference of opinion, the decision of the majority of the arbitrators shall prevail, that all sittings of the arbitrators shall take place at Hapur, and that the parties shall not be entitled as of right to produce any evidence before the arbitrators, but that the arbitrators may take any evidence they think necessary.

The applicants therefore pray for an order of reference accordingly.

No. 96—Application to set aside an award

(S. 30) (vv)

1. In a case referred by the parties to arbitration the arbitrator has filed an award in this court, notice of which has been issued by the Court to the applicant.

authorized to make such application should join. A partner in a firm cannot refer a case to arbitration on behalf of the firm though he can prosecute or defend the suit. (*Gopal Das v. Baij Nath*, 24 A. L. J. 235, 1926 (All.) 238). If some of the parties are interested in a part of the subject-matter, they can refer to arbitration their dispute about this part, and the rest of the suit will continue (S. 24). The application should mention the matter sought to be referred, and the items and conditions of reference which may be agreed upon. The application should be made by all parties but need not be signed by them, (*Umed Singh v. Sobhagmal*, 43 C. 290; *Gudipoodi v. Kattapalli*, 105 I. C. 1051; *Sharafatulla v. Mst. Bhagwati*, 1929 (All.) 763). The guardian of a minor party requires permission of the court (*Seth Ramgopal v. Lala Shantilal*, 1942 (All.) 85; *Kedar Nath v. Basant Lal*, 183 I. C. 422, 1939 (Pat.) 278; *Shripada v. Datta Traya*, 183 I. C. 753, 41 Bom. L. R. 485, 1939 (Bom.) 296); *Umargul v. Abdulmanan*, 1940 (Pesh.) 12, 187 I. C. 860; *Ramanatham v. Kumarappa*, 1940 (Mad.) 650, 1940 M. W. N. 191. If more powers are desired to be given to arbitrators than those given in the order of reference the parties should apply to the court for a fresh order of reference and cannot themselves by agreement give such power to the arbitrator (*Sherbanubhai v. Hosseinbhoi*, 1948 Bom. 292, 50 Bom. L. R. 89). If there is no valid reference the award will be a nullity and can be challenged in any appropriate proceeding apart from S. 30 (*Chhabha Lal v. Kullulal*, 1946 P. C. 72; *Shukrulla v. Rahmat Bibi*, 1947 All. 304).

(vv) Award cannot be set aside except on grounds mentioned in Sec. 30. On setting aside the award, court may supersede the reference (S. 19). Application should be made within 30 days of the service of notice of the filing of award (Art. 119 (b) Limitation Act). Until the award has been filed, an application for setting it aside cannot be made. *Ratanji v. Dhirajlal*, 1942 Bom. 101; *Bengal Jute Mills v. Jevraj*, 1944

2. The applicant prays that the said award be set aside on all or any of the following grounds and the said arbitration be superseded, viz.

(1)

(2)

(3)

etc.

(Cal.) 304); but if award is filed soon after the application, the latter can be considered (*I. G. H. Ariff v. Bengal Silk Mills*, 1949 Cal. 350). If a party is dissatisfied with an award he may wait until the award is filed and he receives notice.

**PETITION UNDER THE INDIAN DIVORCE
ACT (ww)**

**No. 97—Petition, by husband, for dissolution of
marriage**

(In the court of the District Judge at Agra)

Between Samuel Robinson, by profession a sculptor,
residing at Etmadpur, District Agra *Petitioner.*

Catherine Robinson, residing at Drummond Road,
Agra *Respondent.*

and

Henry Jackson, by profession a photo artist, residing
in Partabpura, in the Town of Agra *Co-respondent.*

To the District Judge at Agra.

The 14th of October, 1925.

The Petition of the said Samuel Robinson sheweth—

1. That your petitioner was, on February 5, 1920,
lawfully married to the respondent, Catherine Robinson,
then Catherine Bray, spinster, at Calcutta.

2. That, after his said marriage, your petitioner lived
and cohabited with his said wife at Calcutta from 1920 to
1922 and then at Etmadpur within the jurisdiction of this
court, from 1923 upto the month of June 1925, and that,
your petitioner and his said wife have had issue of the said
marriage, children, one son, Henry Robinson, aged four years
and one daughter, Sarath Robinson, aged two years.

(ww) Though proceedings under this Act are spoken of as suits
and are conducted very much like original suits, they are commenced
not by plaint but by petition, and the parties are not spoken of as plain-
tiffs and defendants but as petitioners and repondents.

If the petitioner is an idiot or a lunatic, the petition should be
brought by the committee or other person entitled to his or her custody
(Sec. 48). If the petitioner is a minor, he or she shall sue through a
next friend approved by the court, but it is essential in this case, that
the next friend should file an undertaking in writing to be answerable
for costs (Sec.49). A form of this undertaking is given at No. 14 of

3. That during the two years immediately preceding June 21, 1925, the co-respondent Henry Jackson was constantly, with few exceptions, residing in the house of your petitioner at Etmadpur aforesaid, and that, on diverse occasions during the said period, the dates of which are unknown to your petitioner, the said Catherine Robinson in your petitioner's said house committed adultery with the said Henry Jackson.

4. That, at the time of the said marriage your petitioner and his said wife were, and still are, Christians.

5. That your petitioner and the said Catherine Robinson are domiciled in India.

6. That no collusion exists between your petitioner and his said wife for the purpose of obtaining a dissolution of their said marriage or for any other purpose. Nor has your petitioner connived at nor condoned the respondent's conduct.

Your petitioner, therefore, prays that this court will decree a dissolution of the said marriage, and that the said Henry Jackson do pay Rs. 5,000 as damages in respect of the said adultery, such damages to be paid to your petitioner or otherwise paid or applied as to this court seems fit.

Verification

No. 98—Petition, by wife, for dissolution of marriage

1. That on April 14, 1917, your petitioner was lawfully married to Samuel Robinson at Tehran in Persia.

the Forms in the Act. The following are the reliefs which can be claimed by such petitions :—

- (1) Dissolution of marriage.
- (2) Nullity of marriage.
- (3) Judicial separation.
- (4) Order for protection of wife's property against her husband or his creditors.
- (5) Restitution of conjugal rights.
- (6) Damages for adultery.

During the pendency of such proceedings, interlocutory orders for alimony, settlement of profits or custody of children may also be obtained on petition made for the purpose. The petitions should be

2. That, after the said marriage, your petitioner lived and cohabited with her said husband at Tehran upto 1918, at Bombay from 1918 to the end of 1919 and since 1920 at No.....Chowringhee Road, Calcutta and that your petitioner and her said husband have had issue of their said marriage four children of whom two only survive, viz., Sarah Robinson, a daughter aged 15 years, and Henry Robinson a son aged 13 years.

3. That, at the time of their said marriage, your petitioner was, and is still a Christian.

4. That the said samuel Robinson has, on July 2, 1925 renounced the Christian faith and embraced Islam under the guidance of Maulana Abdul Jalil of Dacca, and on the same day, July 2, 1925, at Dacca, the said Samuel Robinson went through a form of marriage according to Muhammadan rites with one Musammat Bashiran, daughter of the said Maulana Abdul Jalil.

(Or, that on or about July 3, 1925, the said Samuel Robinson, at his house at No.....Chowringhee Road, Calcutta committed incestuous adultery with his own daughter the said Sarah Robinson).

(Or, that on Junly 3, 1925, at Patna, while the marriage of your petitioner with the said Samuel Robinson was still in force, a ceremony of marriage was duly performed between the said Samuel Robinson and one Laura King, whereby the said Samuel Robinson committed bigamy, and that from

drafted with the same care as a plaint. The facts on which they are founded should be alleged with the same precision and definiteness as in a plaint, avoiding all matters of evidence, law and unnecessary details. But no vague allegations or charges can be permitted and full particulars of all charges of misconduct should be given. The statements contained in every petition should be verified in the same way as allegations in a plaint (Sec. 47). The same rules apply to written statements of the respondents, except that they are not required to be verified. The petition should allege.

(1) The marriage, with its necessary particulars of date and place.

(2) Whether there has or has not been any issue of the marriage, and the issue, if any, living at the time of the petition.

(3) That the petitioner or the respondent professes the Christian religion. (S. 2).

and after the said date, the said Samuel Robinson and the said Laura King, cohabited and committed adultery together at house No.....Railway Road, Patna).

(Or, that on July 2, 1925, at his house No.....Chowringhee Road, Calcutta, the said Samuel Robinson committed rape upon the person of one Smt. Nasiban, widow of Karim Baksh of No.....Colootola Lane, Calcutta, then in the employ of the said Samuel Robinson and your petitioner).

(Or, that on diverse occasions between January 1 and July 4, 1925, the said Samuel Robinson at his house No.....Chowringhee Road, Calcutta, committed sodomy with Baqar Ali, son of Amir Ali of No.....Masjid Vari Lane, Calcutta, a boy servant then in the employ of the said Samuel Robinson and your petitioner).

(Or, that on diverse occasions from January 1, 1925 to June 1925, the said Samuel Robinson committed adultery with Smt. Nasiban, widow of Karim Baksh of No.....Colootola Lane, Calcutta, who was then in the service of the said Samuel Robinson and your petitioner; and on the Good Friday, 1925, at the house of Henry Jackson, a photographer, at Patna, where the said Samuel Robinson, and your

It is not necessary that he should have been a Christian at the time of marriage or his wife should be a Christian at all (*Dalal v. Dalal* 32 Bom. L. R. 1046). Calcutta High Court holds therefore that even a Hindu marriage can be dissolved on the application of the husband after his conversion to Christianity (*Gobardhan v. Jasadamoni*, 18 C. 252). The Madras High Court has taken a contrary view in *Thopita v. Thopita* 17 M. 235, and holds that in view of Sec. 7, the marriage should have been monogamous (Sec. 1 (2)). The Lahore H. C. has held that if a marriage was performed between two Hindus, and afterwards the wife embraced Christianity, application for dissolution can be filed but it cannot succeed unless the marriage was monogamous (*Amaranath v. Mrs. Amarnath*, 1948 Lah. 126 I. L. R. 1947 Lah. 621).

(4) That the husband and wife actually reside within the jurisdiction of the court or that they last resided together within the jurisdiction of the court (Sec. 3 (3)). If they reside within the jurisdiction of the court it is not necessary that they should do so together. This condition is necessary only when jurisdiction is sought to be given to the court, not on the ground of present residence of the husband and wife, but on the ground that they *last resided* within the jurisdiction of the court. The word "together" governs only the words "last resident" (*Henrieta v. Frank Gale*, 10 I. C. 487, 171 P. L. R. 1911; *Robert Leadon*

petitioner were then temporarily staying as guests, the said Samuel Robinson struck your petitioner in the face with his clenched fist and knocked her down and dragged her from the drawing room to the verandah);

[Or, (allegation of adultery); and, on that July 4, 1923, the said Samuel Robinson deserted your petitioner against her wish without reasonable excuse, and from that time down to the present, being for the space of two years and upwards, has continued to desert your petitioner].

(N. B.—In the last case of desertion, the following shall be substituted for the words “since 1920” in para. 2 :—“From 1920 to July 30, 1923”).

5. That the said Samuel Robinson came to India in the year 1919, and settled there with the intention of making it his permanent home, and is now residing at Calcutta.

6. That your petitioner and the said Samuel Robinson last resided together at No.....Chowringhee Road, Calcutta, within the jurisdiction of this Hon’ble Court.

7. That no collusion exists between your petitioner and her said husband for the purpose of obtaining a dissolution of their marriage or for any other purpose, nor has your petitioner connived at nor condoned his conduct.

Your petitioner, therefore, prays that this Hon’ble Court will decree a dissolution of the said marriage of your petitioner with the said Samuel Robinson.

v. *Ethel*, 1926 Oudh 319, 13 O. L. J. 236, 94 I. C. 952; *Edith Walsh v. Edward Walsh*, 101 I. C. 388, 29 Bom. L. R. 308). *Eates v. Eates*, 1949 All. 421, 1947 A. L. J. 670. “Reside” does not mean having sexual intercourse (*Edith Walsh v. Edward Walsh*, Supra). Where a suit for dissolution of marriage and damages is filed in the court of a District Judge within whose jurisdiction the petitioner and his wife were not proved to have last resided, that court has no jurisdiction to try the case and hence where a decree for dissolution is passed by that Judge it would be a nullity and cannot be confirmed. *Barret v. Barret*, 1949 A. L. J. 494 (F. B.). These are the general requirements of all applications under the Divorce Act. In an application for any relief except for dissolution of marriage, it should further be alleged that the petitioner resides in India (Sec. 2). In the majority of cases the allegation will be implied

No. 99—Petition by wife, for a decree of nullity of marriage

The petition of Catherine Bray, falsely called Catherine Robinson, sheweth—

1. That, on October 18, 1922, your petitioner, then a spinster, 19 years of age, was married in fact, though not in law, to Samuel Robinson, respondent, then a bachelor of 28 years of age, at Calcutta.

2. That from the said October 18, 1922, your petitioner lived with the said Samuel Robinson at diverse places and particularly at Calcutta aforesaid.

3. That the said Samuel Robinson has never consummated the said pretended marriage by carnal copulation.

4. That, at the time of the celebration of your petitioner's said pretended marriage, the said Samuel Robinson was, by reason of his impotence, legally incompetent to enter into the contract of marriage.

5. (Allegation about the petitioner being a Christian).

6. That the said Samuel Robinson and the petitioner both reside in the town of Calcutta within the jurisdiction of this Hon'ble Court.

7. (Allegation of absence of collusion, etc.).

Your petitioner, therefore, prays that this Hon'ble Court will declare that the said marriage is null and void.

in allegation No. 4 mentioned above and need not be separately made but when the parties had last resided within the jurisdiction of the court and have since left it, it is necessary to allege that the petitioner still resides in India. Residence in India must be *bona fide* and not casual or as a traveller (*Nusserwanjee Wadi v. Eleanora Wadia*, 38 B. 125, 20 I. C. 482, 15 Bom. L. R. 593). In the case of British subjects not domiciled in India, the Indian and Colonial Divorce Jurisdiction Act, 1926 referred to below gives jurisdiction to Indian Courts, but there is no jurisdiction in the case of non-British subjects who must go to the court of the country of their domicile for relief (*Noor Jehan Begam v. Eugene Tiscenko*, 1941 (Cal.) 582).

Application by persons of European domicile.

There was a conflict in the opinions of High Courts on the question whether Indian Courts could dissolve marriages of persons of European domicile residing in India. Under the recent amendment made

No. 100—Petition by husband for a decree of nullity of marriage

1. That, on the 15th day of July, 1920, your petitioner then a bachelor, thirty years of age, was married in fact, though not in law, to the respondent Catherine Bray, since falsely called Catherine Robinson, at the.....Church, Calcutta.

2. That from the said 15th day of July, 1920 until August 4, 1925, your petitioner lived and cohabited with the said respondent at diverse places, and particularly at No....., Ramsay Street, Dacca, and that your petitioner and the said respondent have had no issue of their said pretended marriage.

3. That, before the celebration of your petitioner's said pretended marriage, the said respondent had, on June 4, 1917, been married to one James Wilson of No..... Somerset Street, Bombay, at the.....Church at Bombay, and at the time of the celebration of your petitioner's said pretended marriage the said James Wilson was living, and

by the Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17 Geo. V), English Courts will now recognize such decree where the parties to the marriage are British subjects domiciled in England or Scotland in any case where a court in India would have such jurisdiction if the parties to the marriage were domiciled in India. But a special procedure is prescribed for such application by the Indian (Non-domiciled (Parties) Divorce Rules, 1927.) Such applications must be made to the High Court, and should state—

- (i) The place and date of the marriage and the name, status and domicile of the wife before the marriage;
- (ii) the status of the husband and his domicile at the time of the marriage and at the time when the petition is presented, and his occupation and the place or places of residence of the parties at the time of institution of the suit;
- (iii) the principal permanent addresses where the parties have cohabited, including the address where they last resided together in India;
- (iv) whether there is living issue of the marriage, and if so, the names and dates of birth or ages of such issue;
- (v) whether there have been in the Divorce Division of the High Court of Justice in England or in the Court of Session in Scotland or in any court in India any, and if so, what, previous proceedings with reference to the marriage by, or on

the marriage of the said respondent with the said James Wilson was then in force.

4. That your petitioner was, on the said July 15, 1920, wholly unaware of the fact of the respondent's said previous marriage with the said James Wilson.

5. That, at the time of the said marriage, your petitioner and the said respondent were, and still are, Christians.

6. That your petitioner and the said respondent last resided together at Calcutta within the jurisdiction of this court. Your petitioner now resides at Hooghly in India and the said respondent resides with her father at No....., Camac Street, Calcutta.

7. That there is no collusion between your petitioner and the said respondent with respect to the subject of this suit. Nor has your petitioner connived at nor condoned her conduct.

Your petitioner, therefore, prays that this court will declare that the said marriage is null and void.

behalf of, either of the parties to the marriage, and the result of such proceedings;

(vi) the matrimonial offences charged, set out in separate paragraphs with the times and places of their alleged commission;

(vii) the claim for damages, if any;

(viii) the grounds on which the petitioner claims that, in the interests of justice, it is desirable that the suit should be determined in India.

The English Act is intended to give validity to decrees and proceedings which though legally taken under the Divorce (Amendment) Act 1926, would be invalid under the English Law. It does not legalize an act which cannot be legally done under the Indian Law (*Lydia v. Samuel*, 110 I. C. 706, 1928 (Lah.) 557). The grounds on which a decree can be granted will be the same as those on which such a decree might be granted by the Divorce Court in England according to the law for the time being in force in England (*M. Barnard v. G. H. Barnard*, 32 C. W. N. 742, 1928 (Cal.) 657, 115 I. C. 572, 56 C. 89). The law in England has been changed in 1937 by the passing of the Matrimonial Causes Act which provides an additional ground for divorce, viz., desertion without cause for a period of at least three years preceding the presentation of the petition. A divorce on this ground can therefore be now applied for in India also (*Nellie O' Hara Fido v. Austin Henry Fido*, 40 Bom. L. R. 900, 177 I. C. 940, 1938 (Bom.) 425). A decree for dissolution of marriage on the ground of impotence will virtually be a decree for nullity hence it cannot be granted under the Indian

**No. 101—Petition by wife for judicial separation,
on the ground of husband's adultery**

Nos. 1-3 as in precedent No. 98.

4. That on diverse occasions in or about the months of March, April and May, 1925, at No.....Chowringhee Road, Calcutta aforesaid, the said Samuel Robinson committed adultery with Flora Jenkins, who was then living in the service of the said Samuel Robinson and your petitioner, at their said residence at No.....Chowringhee Road, Calcutta, aforesaid.

5. That on diverse occasions between June 1, 1925, and June 15, 1925, the said Samuel Robinson at No....., Chowringhee Road, Calcutta aforesaid, committed adultery with Emma Nesfield, wife of George Nesfield, a guard in the employ of the East Indian Railway, who was then staying as guest of the said Samuel Robinson and your petitioner at their said residence, No....., Chowringhee Road, Calcutta, aforesaid.

and Colonial Divorce Jurisdiction Act (*Mrs. Reothar F. Hunter v. Mr. Micheal B. Hunter*, 1942 (Lah.) 302).

The same Act has made it possible to apply for divorce on the ground of cruelty. But proviso (c) to S. 1 of the Act of 1926 provides that no decree shall be passed unless the marriage was solemnized in India or adultery or crime complained of was committed in India. It has been held that as "cruelty" cannot be called a crime, an application on ground of cruelty can be made only if the marriage has been solemnized in India. *E. C. Mathers v. G. S. A. Mathers*, 184 I. C. 529, 1939 (Cal.) 650.

The additional requirements of different applications will be mentioned below.

(1) Petition for dissolution of marriage

Domicile : As no decree for dissolution of marriage can be passed except when the parties to the marriage are domiciled in India at the time when the petition is presented (Sec. 2), it is necessary to allege this fact in the petition. The marriage may have been solemnized anywhere and the crime which is the basis of the claim may have been committed anywhere. In the case of a foreigner, a clear intention to reside and establish himself in India without returning to his native country is necessary to be established before he can be said to have an Indian domicile. The intention is to be inferred from all the circumstances of his life, conduct, habits and so forth (*William H. Murphy v. H. Murphy*, 10 L. 107, 115 I. C. 849), and a mere statement of the applicant that

6. That there is no collusion between your petitioner and her said husband with respect to the subject of this suit. Nor has that petitioner connived at nor condoned his conduct.

7. That the said Samuel Robinson and your petitioner both live in the town of Calcutta within the jurisdiction of this Hon'ble Court.

Your petitioner, therefore, prays that this Hon'ble Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

No. 102—Like petition, on ground of cruelty

1. That on July 20, 1924, your petitioner was lawfully married to Henry Curtis at Bareilly.

2. That after her said marriage, your petitioner lived and cohabited with her said husband at Bareilly until June 20, 1925 when your petitioner separated from her said husband as hereafter more particularly mentioned, and that your petitioner and her said husband have had no issue of the said marriage.

3. That on March 26, 1923, the said Henry Curtis abused your petitioner in the coarsest and most insulting language at the house of George Wood at No....., Civil Lines, Bareilly.

he intends to reside in India is not sufficient to prove domicile (*Moody v. Moody*, 1938 (Lah.) 293, 174 I. C. 992).

The next thing to be alleged is the ground on which dissolution is claimed. If the petitioner is the husband, adultery of the wife alone is a sufficient ground and should be alleged, with full particulars as to time, place, etc. It is not necessary to give exact dates if the same are not remembered, but the time should be clearly defined either by reference to some other well-known event, or otherwise. The petitioner can rely on adultery committed even outside India. (*G. A. Clifford v. E. Clifford*, 45 C. W. N. 249). If the petitioner is the wife, she must allege one or more of the seven grounds laid down in Sec. 10, para. 2, with full particulars. For instance in case of an allegation of adultery, the name of the person with whom adultery is alleged must be given; but if it is not known, it is sufficient to say so and if the person is afterwards identified in evidence, it would be sufficient (*Grant v. Grant*, 167 I. C. 743, 1937 (Pat.) 82). A decree *nisi* for dissolution of marriage

4. That, since November 26, 1924, the said Henry Curtis habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her and beating her with his fists and with a cane.

5. That, on the morning of April 20, 1925, at their house at Bareilly, the said Henry Curtis violently assaulted your petitioner and dragged her out of the drawing-room into the verandah and kicked her.

6. That, on the evening of June 17, 1925, the said Henry Curtis, while at his dinner table, without any provocation, threw a knife at your petitioner, thus inflicting a severe wound in her right hand.

on the ground of adultery can in no circumstance be granted when there is no evidence which the court can accept of the adultery alleged in the petition, upon which the relief is sought. Merely saying that the petitioner's wife had run away with another man whose name is not disclosed in the petition is not enough. (*Ammanna v. Mrs. Epsey Ammana*, 1949 Mad. 7).

Although as a general rule the court would not act on an uncorroborated confession of adultery by the principal respondent, yet it is within the competence of the court to act on such admission and grant a decree for divorce (*Geyer v. Geyer*, 1947 Lah. 867). It would appear that mere adultery of the husband is no ground for dissolution of marriage, unless it is either incestuous, or is accompanied by bigamy or marriage with another woman, or is coupled with cruelty, or desertion without reasonable excuse for two years or upwards, but even mere adultery of the husband would entitle her to claim judicial separation. A wife who has got sufficient grounds for petitioning for dissolution should carefully consider whether to apply for dissolution or for judicial separation only, as if she applies for the latter she cannot subsequently apply for the former without a fresh offence having been committed (*Manjula v. Janaji*, 1940 (Mad.) 510). "Cruelty" does not mean merely physical cruelty, and studied neglect or a course of degradation may amount to cruelty (*Stuart v. Stuart*, 96 I. C. 932, 53 C. 436, 1926 (Cal.) 884). Dwelling with another woman in adultery in the same house has been held to be "cruelty" (*Barkat Bibi v. Nawab*, 1938 Lah. 301, 175 I. C. 21). Insistence that the wife should change her faith from Roman Catholic to Chaldean Church has been held to be "Cruelty" (*V. I. Elizabeth Trichur v. E. P. P. Trichur*, 1936 Ker. 214). If fresh ground is furnished during the pendency of the proceedings, Courts in England take that also into consideration and may base their decision on it, provided a duly verified supplemental application showing these grounds and also that there has been no collusion or connivance is presented with the leave of the court (*Viola Duncan v. George Duncan*, 184 I. C. 801, 1939 (Rang.) 352).

7. That, on the morning of June 20, 1925, when your petitioner's brother came to see your petitioner, the said Henry abused your petitioner in the filthiest language and threatened to kill her.

8. That, on the afternoon of the said June 20, 1925, your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, withdrew from the house of her said husband to that of her brother, at No....., Civil Lines, Bareilly, and has after that day lived separate and apart from her said husband, and has never returned to his house nor had cohabitation with him.

9. That the said Henry Curtis and your petitioner were at the time of the marriage, and still are, Christians.

Lastly it should be alleged in such petitions that there is no collusion or connivance between the petitioner and the other party to the marriage (Sec. 47). There can be collusion in the mere prosecution as distinct from the initiation of a true case. The mere fact that the wife's attorney had furnished certain documents to the petitioner's attorney or that they had subpoenaed the co-respondent is a very narrow ground for inferring collusion (*Linton v. Guberian*, 56 C. 530, 1929 (Cal.) 599).

All the facts including absence of connivance should be proved by the plaintiff even if the wife does not oppose the application. If there is delay, the same should also be explained by the husband (*Hartley v. Hartley*, 1930 Cal. 322, 124 I. C. 465).

Defence : In addition to the usual traverse of the grounds on which the petition is based, the respondent may show any of the circumstances mentioned in the proviso to Sec. 14 e. g., the petitioners own adultery, cruelty or desertion, etc., but if the petitioner is driven to a life of adultery by the husband's own conduct towards her, her adultery would be no defence (*Wilson-de Roze v. Wilson-de-Roze*, 57 C. 891). It may be shown that the petitioner had condoned the adultery complained of or has been in any manner accessory to, or conniving at, the adultery. Full particulars as to time, place, and occasion of the alleged *condonation* should be given, and the condonation should be *after* the alleged marital offence which is made the basis of the petition. Cohabitation after knowledge of a matrimonial offence operates as condonation of that offence (*Emmanuel v. Mandakini*, 1946 (Nag.) 69). But if there is a matrimonial offence after the condonation, the condonation goes and the original offence is revived. Wherever the respondent pleads condonation and the petitioner wants to show such a reviver of the previous conduct by another offence subsequent to the alleged condonation he should at once amend his petition by alleging the reviver and the particulars of the subsequent offence annulling the condonation. The court can, however, recognize the reviver even without amendment if evidence of subsequent offence is admitted (*Prem Chand v. Bai Galal*

10. That the said Henry Curtis and your petitioner both live in the town of Bareilly within the jurisdiction of this court.

11. That there is no collusion between your petitioner and her said husband with respect to the subject of the present suit. Nor has the petitioner connived at nor condoned his conduct.

Your petitioner, therefore, prays that this court will decree a judicial separation between your petitioner and the said Henry Curtis.

No. 103—Like petition, on the ground of desertion

1. That on August 20, 1920, your petitioner was lawfully married to Edward Burke at theChurch at Agra.

105 I. C. 871, 29 N Bom. L. R. 1336, 1927 (Bom.) 594, 51 B. 1026). The second offence which is set up as a reviver of the condoned offence need not be *ejusdem generis* with the latter, but it must be an offence of which a court can take cognizance, or it may be any misconduct (*Blackmore v. Blackmore*, 119 I. C. 220, 1929 (Rang.) 216, 7 R. 313; *Viol Duncan v. George Duncan*, 184 I. C. 801, 1939 (Rang.) 352). Mere familiarity with another person, therefore, will not revive a condoned offence of adultery (*Grace Foster v. Alfred Foster*, 107 I. C. 184, 1 Luck. 685, 1928 (Oudh) 114). Acquiescence is also a good defence. Where the husband sued two years after the adultery and during this time the wife lived with the co-respondent and the husband lived in comfort away from her, held that the husband's conduct amounted to acquiescence in the injury complained of (*King v. King*, 57 C. 215). But mere delay is no defence except that it will effect the quantum of damages (*Felisa E. Geyer v. M. M. Geyer*, 1949 Lah. 34). A wife sued for divorce may show husband's own adultery, as that is a fact which court can consider and in proper cases, though not in all, may refuse relief on such ground (*Ernest v. Anen*, 184 I. C. 110, 1939 All. 522).

Parties :—The other party to the marriage sought to be dissolved is the only necessary party. But to a petition by the husband, the adulterer is also a necessary party. The only grounds on which the husband can be excused from impleading the adulterer are, that the wife is leading the life of a prostitute and the petitioner knows of no particular person with whom she has committed adultery, or that the alleged adulterer could not be known in spite of due efforts, or that he is dead. The petitioner should make an application to the judge, mentioning one of these grounds, and should obtain the judge's order excusing him from impleading the adulterer. Such application should be accompanied by an affidavit showing why the petitioner has been unable to identify or trace the adulterer and what efforts he has made to do so.

2. That after her said marriage, your petitioner lived and cohabited with the said Edward Burkē at Agra until November 20, 1922 and that your petitioner and her said husband have had issue of their said marriage one son, named Charles Burke, aged four years.

3. That on the said November 20, 1922, the said Edward Burke deserted your petitioner against her wish and without reasonable excuse, and from that time down to the present, being for the space of two years and upwards, has continued to desert your petitioner.

4. (As No. 9 in the last Precedent.)

5. That your petitioner and the said Edward Burke last resided together at Agra within the jurisdiction of this court and your petitioner still resides at Agra.

Prayer (as in the last Precedent).

This order should be obtained before the hearing of the petition (*Cox v. Cox*, 45 C. 525).

Where an adulterer is impleaded, the petitioner may add a claim for damages against him. The woman with whom the husband has committed adultery is not a necessary party to a suit by the wife.

(2) Nullity of marriage

No decree of nullity of marriage can be passed except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition (Sec. 2). These facts must therefore be alleged. The petition can be based on one or more of the grounds mentioned in Sec. 19, and such ground or grounds must be clearly alleged in the petition. The court has no power to pass a decree on any other ground under the guise of equity (*H. v. H.*, 30 Bom. L. R. 523, 1928 (Bom.) 279, 110 I.C. 266). The power to annul a marriage on the ground of fraud, e. g., a moslem husband's representation that he was a Christian, is saved by S. 19 itself. (*Therisia v. Mustafa*, I. L. R. (1939) 2 Cal. 60, 1940 (Cal.) 75, 186 I. C. 593). Marriage can be annulled on the ground of impotency as regards wife, even if the husband is not impotent as regards other woman (*ibid*). An application for nullity on the ground of impotency of husband was dismissed by compromise. A second application on the same ground was held to be barred (*ibid*).

It should further be alleged that there is no collusion or connivance between the husband and the wife. Where the Court declares under Section 19, the marriage to be null and void, only one final decree should be passed. (*Joseph Conan Sow v. Dorothy Smow*, 1940 A. L. J. 31).

(3) Judicial separation

Such decree can be passed on the application of the husband or wife, on the ground of adultery, or cruelty or desertion without reason-

No. 104—Petition for protection order

1-3. and 5 (as in the last Precedent).

4. That, since the desertion by her husband, the said Edward Burke, your petitioner has maintained herself by her own industry (or, on her own property), and has thereby and otherwise acquired certain property, consisting of the following :—

- (i) A house, being premises on the Drummond Road, Agra.
- (ii) A five biswa share in mahal Barkat, village Shamshabad, pargana and tehsil Kiraoli in the District of Agra.

The petitioner, therefore, prays for an order for the protection of her earnings and property acquired since the said November 20, 1922, from the said Edward Burke, and from all creditors and persons claiming under him.

No. 105—Petition by wife for restitution of conjugal rights

1 and 2 (as in Precedent No. 103).

3. That the said Edward Burke did, on the said November 20, 1922, withdrew from cohabitation with your petitioner and has ever since, without any just cause, kept and continued away from her and has also refused, and still refuses, to render conjugal rights.

4 and 5 (as in the Precedent No. 103).

able excuse for two years or upwards. One or more of these grounds should, therefore, be clearly alleged with full particulars. The particulars necessary in case of adultery have already been mentioned. Each act of cruelty must be mentioned with date, place, etc., but if the acts have been almost continuous during a particular period, that period alone may be mentioned, thus, "on diverse occasion in the month of February." What particulars are necessary in case of desertion are mentioned below under "Protection Order." The allegation of want of connivance or collusion should be made in this petition also. The consequence of such a decree is a limited one, viz., the wife is, whilst so separated, considered as an unmarried woman for the purposes of contract, wrongs and injuries and suing and being sued in any civil proceeding, and with respect to property which she may acquire or in-

Your petitioner, therefore, prays for a decree that the said Edward Burke do take home and receive your petitioner as his wife and render to her conjugal rights.

RESPONDENTS ANSWERS

No. 106—Respondent's statement in answer to petition No. 97

Catherine Robinson, the respondent, by Ahmad Karim, her vakil, in answer to the petition of Samuel Robinson, says that she denies that she had on diverse, or any, occasions, committed adultery with Henry Jackson, as alleged in para. 3 of the said petition.

Wherefore the respondent prays that this court will reject the said petition.

No. 107—Co-respondent's statement in answer to No. 97

Henry Jackson, the co-respondent, in answer to the petition filed in this court, says that he denies that he committed adultery with the said Catherine Robinson as alleged in para. 3 of the said petition or at all.

herit (Secs. 24 and 25). The respondent may plead the applicant's adultery, as that is sufficient legal ground for rejecting the application (*John Henry Rhine v. Mobil Rhine*, 33 A. 500, 8 A. L. J. 18).

(4) Protection Order

If a husband deserts his wife without a reasonable excuse, and the wife acquires property she may require an order to protect that property from her husband or her husband's creditors. She may apply for such order, and should in her petition allege (1) the fact of desertion (2) that the same was without reasonable excuse, (3) the time of the commencement of desertion, and (4) that the petitioner is maintaining herself by her own industry or property.

The consequence of such a protection order is the same as that of a judicial separation (Sec. 31).

(5) Restitution of conjugal rights

Either the husband or the wife can make a petition for this relief when the other party has, without reasonable excuse, withdrawn from the society of the petitioner. The petition should allege the marriage and cohabitation, and subsequent withdrawal of the respondent from cohabitation without any just cause and should also allege that the withdrawal still continues.

Wherefore the said Henry Jackson prays that this court will reject the prayer of the said petitioner and order him to pay the costs of, and incident to, the said petition.

No. 108—Statement in answer to petition

No. 101

Samuel Robinson, the respondent, by Ram Prasad, his wakil, says :—

1. That he denies that he committed adultery with Flora Jenkins as alleged in para. 4 of the petition or at all.

2. That the petitioner condoned the said adultery with Flora Jenkins, if any.

3. That he denies that he committed adultery with Emma Nesfield as alleged in para. 5 of the petition or at all.

4. That the petitioner condoned the adultery with the said Emma Nesfield, if any.

Defence : If marriage is admitted, the only grounds on which the respondent can defend such a suit are those on which he or she could sue for judicial separation or for a decree for nullity of marriage (Sec. 33). These grounds are mentioned in Secs. 19 and 22.

(6) Damages for adultery

A claim by husband for such damages may be joined to one for dissolution of marriage or for judicial separation, or may be made in a separate petition. The petitioner should allege the adultery with necessary particulars. In a suit by wife for judicial separation, the husband who is respondent can include in his written statement a claim for damages against the alleged adulterer of his wife. (*Mrs. Merele Norun v. Henry Donald Natt*, 1948 All. 326).

(7) Costs

An application by the wife for an order directing the husband to pay to her a sum of money in order to enable her to meet the expenses incidental to the defence of the suit for dissolution of marriage is maintainable under Section 7. She is entitled to an order against her husband for payment of her costs to arrange for her defence. (*Lewis v. Lewis*, 1949 Mad. 877).

PETITIONS UNDER THE HINDU MARRIAGE ACT^(xx)

No. 109—Hindu wife's petition for dissolution
of marriage.

IN THE COURT OF THE DISTRICT JUDGE
OF KANPUR.

Smt. Champa, daughter of Prem Narain, resident of
Mohalla Phul Bagh, Kanpur. Petitioner.

Versus

Ram Das S/O Bhikari Das, resident of Lal Bagh,
Lucknow. Respondent.

The aforesaid petitioner respectfully submits as
follows :—

1. That on 4-1-42 the petitioner was married to Ram Das, respondent, at Kanpur.
2. That at the time of the marriage, the petitioner and said Ram Das were, and still are Hindus.
3. That the parties have two issues of the said marriage viz., Krishna Das (a son aged 6 years) and Pushpa (a daughter aged 4 years).
4. That the petitioner and respondent last resided together in February 1953 at Lal Bagh in Lucknow.

(xx) Proceedings in court under the Hindu Marriage Act (25 of 1955) as amended by Act (73 of 1956) which now include claims for restitution of conjugal rights also, (*Vikram Singh v. Sudarshan Singh*, 1961 All. 150) commence, like corresponding proceedings under the Indian Divorce Act (4 of 1869), by means of a petition and not by presentation of a plaint. Broadly speaking the petitions under the Hindu Marriage Act are to be drafted on the same lines as under the Indian Divorce Act. There are some points of difference which are noted below.

Petitions under the Act lie in the District court within the local limits of whose ordinary Civil Jurisdiction the marriage was solemnized or the husband and wife reside or last resided together. But unlike the proceedings under the Indian Divorce Act the decisions of the District court do not stand in need of confirmation by High Court.

The term 'District Court' means, in any area for which there is a city civil court, that court and in any other area the principal civil

5. (a) That the respondent is living in adultery with one Smt. Ram Piari

or

(b) has embraced Christianity (If this be the ground omit in para. 2 "and are still Hindus")

or

(c) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of this petition

or

(d) has for a period of not less than 3 years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy

or

(e) has, for a period of not less than 3 years immediately preceding the presentation of the petition, been suffering from syphilis in a communicable form, the disease having been contracted from some one other than the petitioner

or

(f) has renounced the world and became a sadhu

or

(g) has not been heard of for over seven years by any one of his relations (In such cases the date of last

court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in the Act.

The petition under the Act should be verified like complaints and should contain a statement to the effect that there is no collusion between the petitioner and the other party to the marriage.

Before proceeding to grant any relief under the Act it is the duty of the court in the first instance, in every case in which it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. In all proceedings under the Act, whether defended or not, the court should before granting the relief, be satisfied that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, that the petitioner has not been accessory to, and has not condoned or connived at the other party's unchastity, has not condoned the other party's cruelty, that the petition is not col-

residing together should be more than seven years remote from the date of petition)

or

(h) has not resumed cohabitation for a period of over two years after decree No. 713 of 1954 which the petitioner obtained against him for judicial separation

or

(i) has failed to comply for over two years with a decree No. 725 of 1955 for restitution of conjugal rights which the petitioner obtained against him

or

(j) that the respondent has married again after his marriage with the petitioner and that wife is still alive

or

(k) that the respondent has, after his marriage with the petitioner been guilty of rape, sodomy or bestiality.

6. That there is no collusion between the petitioner and the respondent, and that the petitioner has neither condoned nor connived at the respondent's conduct.

The petitioner, therefore, respectfully prays that the Hon'ble Court may be pleased to dissolve the petitioner's marriage with the respondent.

lusive and that there has been no unnecessary or improper delay. The court may, and if any party so desires shall, conduct the proceedings in camera.

No petition for dissolution of marriage can normally be presented until after the expiry of three years from the solemnization of marriage. But the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, entertain a petition for divorce before the expiry of the aforesaid period of three years if the case is of exceptional hardship to the petitioner or of exceptional depravity on the part of respondent. But if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the ex-

No. 110—HINDU WIFE'S PETITION FOR NULLITY OF MARRIAGE

Paras. 1-4 as in Precedent No. 109.

5. (a) That the respondent had a wife living at the time of the marriage

or

(b) That the respondent is the brother of the petitioner's deceased husband and as such the parties are within prohibited degrees of relationship

or

(c) That the respondent is the petitioner's mother's brother and as such parties are sapindas of each other

or

(d) That the respondent was impotent at the time of marriage and continues to be so till now

or

(e) That the respondent was an idiot or lunatic at the time of marriage

or

(f) That the petitioner's consent to marriage was obtained by the respondent at a lonely place by putting the petitioner in fear of death. The petitioner secured her release from the respondent's custody only two months ago and has not during the said period of two months lived with him as wife

or

(g) That the petitioner's consent to marriage was obtained by the respondent by falsely representing to her that he was a landed magnate. The petitioner discovered two months ago that the respondent owns no property and

piration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal

is a pauper. Since this discovery the petitioner has withdrawn herself from respondent's company and has not lived with him as his wife.

6. (As in Precedent No. 109).

The petitioner, therefore, respectfully prays that the Hon'ble Court may be pleased to declare the petitioner's marriage with the respondent as null and void.

No. 111—HINDU WIFE'S PETITION OF JUDICIAL SEPARATION

Paras. 1-4 as in Precedent No. 109.

5. (a) That the respondent has deserted the petitioner for a continuous period of over two years immediately preceding the presentation of the petition and has neither written to her nor provided her food and raiment

or

(b) (i) That on 5th of November 1956 the respondent abused the petitioner in a very filthy language at his house in the presence of guests and relations and that on the petitioner's protest the respondent kicked the petitioner and gave her a beating.

(ii) That the petitioner is since then living with her brother and has serious apprehension that she will again be beaten, abused and otherwise mal-treated if she goes to the respondent's house

or

(c) That the respondent has, for over one year from today been suffering from a virulent type of leprosy

or

(d) respondent has for over three years been suffer-

having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again :

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

ing from syphilis in communicable form, the disease having been contracted from some one other than the petitioner

or

(e) that the respondent has been of unsound mind for over two years

or

(f) The respondent has, after his marriage with the petitioner, had sexual intercourse with Smt. Ram Piari, a servant of the respondent.

Para. 6 as in Precedent No. 109.

The petitioner, therefore, respectfully prays that the Hon'ble Court may be pleased to grant judicial separation to your petitioner from the respondent.

No. 112—Hindu Wife's petition for Restitution of Conjugal Rights

Paras. 1-4 as in precedent No. 109.

5. That in February 1953 respondent withdrew from cohabitation from the petitioner and has ever since, without any cause, kept away from the petitioner and has not rendered conjugal obligations.

6. That there is no collusion between the parties and that the petitioner has neither condoned nor connived at the respondent's conduct.

The petitioner respectfully prays that the Hon'ble Court be pleased to order restitution of conjugal rights to the petitioner by directing the respondent to come over to the petitioner and render marital obligations to her.

No. 113—Hindu Husband's Petition for Dissolution of Marriage

This petition is to be drafted mutatis mutandis, on the lines of Precedent No. 109, except that clauses (i) and (k) shall not apply.

There is no bar against the divorced persons marrying each other after the expiry of the aforesaid period.

No. 114—Hindu Husband's petition for Nullity of Marriage (yy)

This petition is to be drafted, *mutatis mutandis*, on the lines of Precedent No. 110. The following additional ground will, however, be available to the husband.

(b) That the respondent was pregnant at the time of marriage from some person other than the petitioner, and this fact was not known to the petitioner at that time.

(i) That the petitioner has refrained from marital intercourse since the discovery of the fact.

No. 115—Hindu Husband's Petition for Judicial Separation

This petition is to be drafted, *mutatis mutandis*, on the lines of Precedent No. 111.

No. 116—Hindu Husband's petition for Restitution of Conjugal Rights

Paras. 1-4 are to be drafted *mutatis mutandis* on the lines of paras. 1-4 of Precedent No. 109.

5. That in February 1953 respondent's brother took her away from the petitioner's house by making a representation that the respondent's younger sister was to be married in the following month.

6. That respondent has not returned to the petitioner's house notwithstanding the fact that the petitioner went several times to bring her home.

7. That without any cause the respondent is refusing to perform her marital obligations.

(yy) The husband's petition for nullity of marriage on the ground that the respondent was pregnant at the time of the marriage by some person other than the petitioner the proceedings must commence, in the case of a marriage solemnized before the commencement of the Hindu Marriage Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage. The Act came into force on May 18, 1955.

8. That there is no collusion between the parties and that the petitioner has neither condoned nor connived at the respondent's conduct.

That the petitioner respectfully prays that the Hon'ble Court may be pleased to order restitution of conjugal rights to the petitioner by directing the respondent to come over to the petitioner's house and render marital obligations to him.

PRECEDENTS

Writ of Habeas Corpus

IN THE HON'BLE COURT OF JUDICATURE AT
ALLAHABAD*Misc. Writ application No. 125 of 1951*

Under Article 226 of the Constiution of India.

Ram Prasad, son of Champa Lal,
caste Brahman, resident of Mohalla Ram
Narian Bazar, Kanpur

*Petitioner**versus*

The State of Uttar Pradesh
To *Opposite party.*

The Hon'ble Chief Justice and the companion Judges
of the aforesaid Court.

The humble petition of the above-named petitioner
most respectfully sheweth :—

1. That the petitioner is a peaceful citizen of India
and is employed as a teacher in the D. A. V. Inter College,
Kanpur.

2. That on 5th May, 1950, the petitioner was arrested
and detained in the Central Jail, Kanpur by an order of the
District Magistrate dated 3rd May 1950 passed under the
provisions of the Preventive Detention Act (Act IV of 1950).

3. That in spite of repeated demands, grounds of
detention were not furnished to the petitioner until 4th June
1950 and these grounds were :—

(a) That you along with your associates have been
collecting and are likely to collect arms and
ammunition illegally for illegal purposes and
illegal activities.

(b) That you made several fiery speeches and held sec-
ret meetings trying to create disaffection against
the present Government.

4. That the aforesaid order of detention is illegal and without jurisdiction for the following reasons :—

- (a) That the said order does not specify the period of detention;
- (b) That the grounds of detention were not furnished to the petitioner “as soon as may be” as provided by Act 22 of the Constitution;
- (c) That the grounds of detention furnished to the petitioner are vague and uncertain and are not such as to enable the petitioner to make a proper representation.

It is, therefore, prayed that the Hon'ble High Court may be pleased to issue a writ in the nature of Habeas Corpus to the opposite party directing that the petitioner who is illegally detained may be set at liberty at once.

(Sd.) COUNSEL FOR PETITIONER.

**Writ in the nature of Mandamus or Prohibition
IN THE HON'BLE HIGH COURT OF JUDICATURE
AT ALLAHABAD**

(Under Article 226 of the Constitution of India.)

Civil Miscellaneous Writ No. 15 of 1951

Durga Prasad son of Shivpalak Ram,
resident of Mohalla Attarsuiya, Allahabad.

Petitioner

versus

1. State of U. P.

2. District Magistrate, Allahabad. *Opposite parties.*

To

Hon'ble the Chief Justice and His companion Judges
of the aforesaid court.

The humble petition of the above-named petitioner most
respectfully sheweth :—

1. That the petitioner is the owner in possession of
house No. 522, Attarsuiya, Allahabad in which he is residing
with his family.

2. That on 15.10.51 an order purporting to have been
passed by the District Magistrate of Allahabad, opposite
party No. 2, under Section 3 of U. P. (Temporary) Accom-
modation Requisition Act 1947 (Act XXV of 1947) was
served upon the petitioner requiring him to deliver posses-
sion of the said house to the collector within 16 days.
A true copy of the said order is Annexure 'A' to the
petition.

3. That as required by the proviso to S. 3 of the said
Act, no alternative accommodation has been provided for
the petitioner nor has the District Magistrate held that
suitable alternative accommodation exists for the petitioner's
needs.

4. That the petitioner is greatly aggrieved by the aforesaid order and will be greatly inconvenienced if he is required to vacate his house as directed.

5. That the petitioner has no other alternative, effective and speedy remedy for the redress of his grievance and can only invoke the jurisdiction of this Hon'ble court.

6. That the order of requisition (Annex. 'A') is invalid and without jurisdiction as the condition precedent for the exercise of the power of requisition conferred by S. 3 of the said Act, has not been fulfilled.

7. That before requisitioning the accommodation the District Magistrate was bound in law to provide suitable alternative accommodation to the petitioner, but in spite of being requested to do so, did not pay any heed.

Prayer

It is, therefore, most respectfully prayed that :

- (a) A writ, order or direction in the nature of prohibition be issued directing the opposite parties not to dispossess the petitioner from his house aforesaid in pursuance of the order, Annexure 'A'.
- (b) A writ of mandamus or a writ, order or direction in the nature of mandamus be issued commanding the opposite parties to provide alternative accommodation to the petitioner, if his house aforesaid is to be requisitioned.
- (c) Costs of this petition may be allowed. ✓

Counsel
for the petitioner.
'18.10.57.

Writ of Quo Warranto
IN THE HON'BLE HIGH COURT OF JUDICATURE
AT ALLAHABAD

Civil Miscellaneous Writ No. 264 of 1964.

(under Art. 226 of the Constitution of India)

Kishan Chand s/o Ram Pratap r/o village Bagahi, Tehsil
Karakat, Distt. Jaunpur. *Petitioner.*

versus

Guru Prashad s/o Ram Sarup r/o Village Bagahi, Tehsil
Karakat, Distt Jaunpur *Opposite party*

To

The Hon'ble Chief Justice and his companion Judges
of the aforesaid court.

This humble petition of the above-named petitioner
most respectfully sheweth :

1. That the petitioner is a resident of village Bagahi, Tehsil Karakat, Distt. Jaunpur and is a member of the Gaon Sabha of the village.
2. That the opposite party, Guru Prashad is wrongfully claiming himself to be the Sarpanch of the Nyaya Panchayat, Circle Bagahi, in which the petitioner resides.
3. That in 1963 the opposite party was convicted by the Sessions Judge of Jaunpur, under Section 376, 511, I.P.C. and was sentenced to six months R. I. The conviction and sentence were upheld in appeal by the Hon'ble High Court.
4. That the conviction of the opposite party being in respect of an offence involving moral turpitude, he was disqualified under Section 5 A of the U. P. Panchayat Raj Act, for being nominated as a Panch and from being elected as a Sarpanch.
5. That the opposite party has no right to hold the office of Sarpanch of Nyaya Panchayat of Circle Bagahi.

Prayer

It is, therefore, most respectfully prayed that a writ of quo warranto or a writ or order, or direction of the appropriate nature be issued to the opposite party requiring him to show the authority under which he holds the office of Sarpanch, Nyaya Panchayat, Circle Bagahi, Distt. Jaunpur and he be restrained from functioning as such.

Counsel for the petitioner.

Writ of Certiorari
IN THE HON'BLE HIGH COURT OF JUDICATURE
AT ALLAHABAD

Miscellaneous Writ application No. 210 of 1950
 Under Art. 226 Constitution of India

Ganesh Prasad, son of Mahesh Prasad,
 caste Agrawala, resident of 15, Mall Road,
 Agra Cantt. *Petitioner*

versus

1. The Rent Control and Eviction
 Officer, Agra

2. Ramchandra, son of Ram Gopal,
 caste Agarwala, resident of Kutchery Road,
 Agra *Opposite parties*
 To

The Hon'ble Chief Justice and the companion Judges
 of the aforesaid Court.

The humble petition of the above-named petitioner
 most respectfully sheweth :—

1. That the petitioner owns a bungalow 15, Mall
 Road, Agra Cantt.

2. That the Eastern portion of the bungalow was let
 out to tenant, Mahesh Prasad, who vacated the premises
 on 15th July 1950.

3. That the petitioner himself occupies and resides in
 the western portion of the bungalow.

4. That the Rent Control and Eviction officer, Agra
 without consulting the petitioner allotted the said eastern
 portion to Ram Chandra opposite party No. 2 against the
 wishes of the petitioner who desired it to be allotted to his
 nominee Ramesh Prakash, who is a more desirable person
 and whose need is greater.

5. That he is greatly aggrieved by the said order and has no other adequate, effective and speedy remedy except invoking the writ jurisdiction of this court.

6. That the said order of the Rent Control Officer is illegal and without jurisdiction for the following reasons :—

(i) it has been passed in contravention of Rule 7 of the Rent Control Rules.

(ii) that the rules of natural justice have been infringed as the petitioner was not given any opportunity of being heard.

It is, therefore, respectfully prayed

(i) That the Hon'ble High Court will be pleased to issue a writ of certiorari to the Rent Control and Eviction Officer, Agra and quash his order dated 10th September, 1950.

(ii) That an ad-interim injunction be issued staying the operation of the said order pending the disposal of the application.

PRECEDENTS

Election Petition¹

Election Petition No.

of 196

To

THE ELECTION COMMISSION OF INDIA,
NEW DELHI.Sri Khuda Baksh, son of Mohd.
Bakhsh, resident of Phulpur, Etawah.. *Petitioner.**versus*1. Sri Rameshwar Nath Gupta,
M. L. A., mohalla Barahi Tola, Etawah .. *Respondent.*

Election petition, under Sections 80, 81 of the Representation of the Peoples Act, challenging the election of Sri Rameshwar Nath Gupta to the U. P. Legislative Assembly, from the single member Etawah, Constituency No. 150, result of which was declared on.....

The petitioner, above named, most respectfully submits as under :

1. That the petitioner was a candidate on behalf of the Congress Party in the last General Election for the U. P. Legislative Assembly from the single member Etawah Assembly Constituency No. 150 and Sri Rameshwar Nath Gupta who was declared elected was a Jan Sangh candidate. Four other candidates, viz. Sarvshri A, B, C and D also contested the said election.

2. That the polling for the said Etawah Assembly Constituency No. 150, was held on.....and the counting took place on.....

¹*Presentation*—An election petition has to be presented to the Election Commission by any candidate at the election or by an elector. The elector means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not. Presentation is made when the petition is (a) delivered to the Secretary to the Commission or to such other officer as may be appointed

3. That on the last mentioned date the result of the said election was declared by the Returning Officer, and the respondent was declared to be elected to the U. P. Legislative Assembly from the aforesaid Constituency by a meagre margin of 755 votes against the petitioner. The details of the votes secured by each candidates are given as under :

	Votes
(1) Sri Rameshwar Nath Gupta (Jan Sangh)	12,043
(2) Sri Khuda Baksh (Congress) ..	1,288
(3) Sri A (Socialist)	9,966
(4) Sri B (Ram Raj Parishad)	1,113
(5) Sri C (Independent)	1,003
(6) Sri D (P. S. P.)	966

4. The election of the respondent, Sri Rameshwar Nath Gupta to the U. P. Legislative Assembly from the Single Member Etawah Assembly Constituency No. 150 is void, inter alia, on the following.

GROUND

(a) Because the respondent was on the date of his election as well as nomination disqualified to be chosen a member of the Legislative Assembly, under Section 7 (d) of the Representation of the People Act as he had a share as well as interest in a contract with the Government of Uttar Pradesh in the name of Anandkar Printing Press, Etawah and its parent firm Anandkar Karyalay Limited, Etawah, for the publication of Electoral Rolls and other papers connected with the General Election.

by the Election commission in that behalf by (i) the person making the petition or (ii) by a person authorised in writing in that behalf by the person making the petition or

(b) when it is sent by registered post and is delivered to the Secretary to the Commission or the Officer so appointed.

While being presented the petition should be accompanied by as many copies thereof as there are respondents impleaded in the petition. Every such copy must be attested by the petitioner under his own signature to be a true copy of the petition. The copy need not be exact. The only thing necessary is that it should be so prepared that no one is misled in any way. If each page of the Copy is attested, separate attestation for the copy as a whole is not required (*Murarko Radhey*

(b) Because the respondent himself and his agents and workers with his consent committed corrupt practice of publication of statements of facts which were false and which were believed to be false or were not believed to be true in relation to the personal character and conduct of the petitioner as well as in relation to his candidature. The statements are contained in a fortnightly magazine known as 'Etawah Samachar' and election bulletins headed 'Vigyapti' issued recently for this election. These statements were reasonably calculated to prejudice the prospects of the petitioner's election. The particulars of this corrupt practice are given in Schedule I annexed hereto.

(c) Because the respondent himself and his agents and workers with his consent made an appeal to the Hindu electors to vote for the respondent on grounds of race, community and religion and to refrain from voting for the petitioner on the ground of his being a Muslim. They

Shyam v. Roop Singh, 1964 S. C. 1545). Only a substantial compliance with this requirement is necessary. Thus where carbon copies were filed bearing signature and verification, the omission to mention "true copy" before or above signatures was held to be not fatal (*Ch. Subbarao v. Member Election Tribunal*, 1964 S. C. 1027). Clerical errors in copies were also held to be immaterial (*Srikrishna Goyal v. Purshottam Lal*, 1964 A. L. J. 46).

Limitation :

Under S. 81, limitation for a petition is 45 days from the date of the election of the returned candidate or if there are more than one candidate returned at the election and the dates of their elections are different, the later of those dates. It should be noted that an election petition cannot be filed before the date of the election of the returned candidate. The date of the election is to be excluded while calculating the period of 45 days (vide Cl. 9, Gen. Clauses Act) but the last day of the period must be included. If the office of the Secretary or other officer authorised to accept delivery of election petition is closed on the last day of the period, then it can be delivered on the next day afterwards on which the office is open (4 E. L. R. 54).

Defence :

Points usually raised in defence are of two kinds, technical and substantial. Defects of a formal nature like nonjoinder, improper framing of petition, absence of particulars, wrong verification, non compliance with the requirements of security or presentation, limitation, wrong presentation, absence of proper affidavit, non-attestation, or inaccuracy of copies etc. are defences of a technical nature. Substantial defence

described him a Pakistani and published and propagated statements which had the effect of promoting or attempting to promote feelings of enmity or hatred between different classes of citizens of India on the ground of religion, race, caste and community. These were made to excite the religious sentiments of the voters against the petitioner. These publications and statements were calculated to prejudice the prospects of your petitioner's election and have actually resulted in a large number of voters being misled and not voting for your petitioner. Details of such false and malicious statements and the manner in which they were propagated are set out in Schedules 1 and 2 here to annexed, which form part of this petition. This corrupt practice permeated the whole constituency.

(d) That the corrupt practices mentioned above were committed by the respondent or his agents and workers with his consent, for the furtherance of the prospects, of the respondent and to prejudice the prospects of the petitioner's election. As a consequence thousands who wanted to vote for the petitioner changed their minds and either voted for the respondents or refrained from voting. This has materially affected the result of the election. Particulars of these corrupt practices have already been given in the Schedules 1 and 2.

(e) Because the respondent himself and his agents and workers with his consent, committed the corrupt practice of

will consist of denial of the corrupt practices alleged and explanation of the allegations of fact. As an election petition can be maintained only on one or more grounds mentioned in Secs. 100 and 101 an attempt is made in the written statement to show that such grounds do not exist or that the allegations made in the petition are insufficient to make out such grounds.

Recrimination :

If one of the prayers in the petition is a declaration that any candidate other than the returned candidate has been duly elected, the returned candidate or any other party to the petition may file a recrimination and lead evidence in support of it to prove that the election of the candidate sought to be declared elected would have been void if he had been returned. In other words the claim that any other candidate may be declared elected can be defeated on all available grounds as if that can-

bribery within the meaning of Section 123 (1) of the Representation of the Peoples Act, 1951, by offering and paying money to considerable number of voters, in case they did not actually themselves cast their ballot papers in the ballot boxes, but handed over the same to the agents and workers of the respondent stealthily outside the polling station in order to make sure the securing of these votes in favour of the respondents. This was done with a view that the said votes may not be dropped by the electors in the ballot boxes of the petitioner. Voters who were actually not prepared to vote for the respondent were also in this manner won over to go away with their ballot papers in their pockets. As a matter of fact at several polling stations a number of ballot papers were found folded in bundles in the ballot boxes of the respondent and some of the ballot papers issued were not found at all in any of the ballot boxes. Details of this corrupt practice are given in Schedule 3.

(f) Because the respondent far exceeded the prescribed maximum limit of the election expenses, and committed the corrupt practices laid in Section 123 sub-section 6 of the said Act as he failed to keep separate and correct account of all expenditure incurred by him in connexion with the election and that the election account, i.e., election returns lodged by the respondent are false in material respects vide details given in Schedule 4.

(g) Because the said respondent himself and his agents and workers hired and procured vehicles for the conveyance

didate had been a returned candidate and a petition had been presented challenging his election. No recrimination is permitted unless the returned candidate or any other party who wants to make it, ha within 14 days from the date of commencement of the trial given notice to the Tribunal of his intention to recriminate and has also given security and further security as required by Sections 11 and 118 of the Act. The grounds of recrimination are usually stated in a document which is ordinarily known as petition of recrimination and has to be drafted and verified like an election petition of course with suitable changes. The right to recriminate is a special right and arises only when a declaration is claimed about any particular candidate having been elected. The right is not there if no such claim has been made. A recriminatory petition becomes unnecessary and need not be heard if the petitioner in

of the electors to the polling stations and back to their places and thereby committed the corrupt practice specified in section 123 sub-section 5 of the Representation of the Peoples Act, 1951. This act of the respondent, his agents and workers with his consent, greatly enhanced the prospects of the respondents at the said election as against the petitioner. Details of the polling stations to which electors were so carried is given in Schedule 5 annexed hereto.

(h) Because the said respondent himself and his agents took the assistance of Government Officials to further the prospects of his election. He appointed a large number of such persons as polling agents and took their help in canvassing and influencing the voters. The names of such Government Officials are set out in Schedule 6 annexed hereto.

(i) Because there has been non-compliance with the provisions of the Representation of the Peoples Act, 1951, the rules and the orders made therein vide Schedule 7 attached hereto.

(j) Because the petitioner is an old Congressman, who always opposed the Muslim League and other reactionary bodies. He was wrongly and prejudicially painted in the said "Etawah Samachar" and "Vigyapti" and statements referred to above. The publications of the said papers and propagations of wrong and false statements prejudicially affected the petitioner's chances and a large number of persons who would have otherwise voted for him either voted for the respondent and the other candidates or refrained from voting.

the election petition withdraws his prayer for a declaration that he or any other candidate has been duly elected.

An appeal against an order under Secs. 98, 99 made by an election tribunal in an election petition lies to the High Court under S. 116-A of the Act and is to be heard as an appeal from the original decree. It has to be preferred within 30 days from the date of the order appealed from. The High Court for sufficient cause may entertain an appeal even after the expiry of the prescribed period.

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